TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 576.

EDWARD B. WHITNEY, AS TRUSTEE IN BANKRUPTCY OF DANIEL LE ROY DRESSER AND CHARLES E. RIESS, AS MEMBERS OF THE FIRM OF DRESSER & CO., APPELLANT,

vs.

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE G. BOLDT, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 28, 1905.

(19,675.)

(19,676.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 22, 1905.

1 United States District Court, Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Reiss, as Members of the Firm of Dresser & Company, Complainant-Appellant,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage & Trust Company, Defendants-Appellees.

Statement.

1904.
Nov. 7. Filed complaint.
Dec. 2. Filed appearance U. S. Mortgage & Trust Co. by Messrs. Rollins & Rollins.
" 5. Filed appearance Security Warehousing Company by Messrs. Smith & Barker.
" 6. Filed appearance of L. F. Doyle, Esq., for Wenman, Fish & Boldt.

1905.
Jan. 3. Filed demurrer C. H. Wenman.
" " Filed demurrer Stuyvesant Fish.
" " Filed demurrer Geo. C. Boldt.
" " Filed demurrer Security Warehousing Co.
" 24. Filed notice of argument of demurrer.
Feb. 7. Demurrer sustained, memo., Holt, J.
" 21. Filed order sustaining demurrers.
M'ch 2. Filed certificate.
" " Filed petition and allowance of appeal.
" 2. Filed assignment of errors.
" 9. Filed citation.

2 The District Court of the United States in and for the Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Reiss, as Members of the Firm of Dresser & Co.,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Company, and United States Mortgage & Trust Company.
} In Equity. No. —.

To the judges of the district court of the United States in and for the southern district of New York:

Edward B. Whitney, as trustee in bankruptcy of Daniel Le Roy Dresser and Charles E. Reiss, as members of the firm of Dresser &

Co., bankrupts, brings this his bill against Charles H. Wenman Stuyvesant Fish, George C. Boldt, the Security Warehousing Company and the United States Mortgage and Trust Company (paragraphs numbered 2 to 4 and 6 to 30, all inclusive, being stated on information and belief); and thereupon your orator complains and says that:

1. On or about the 17th day of September, 1903, your orator was duly appointed trustee in bankruptcy of Daniel Le Roy Dresser and Charles E. Reiss, individually and as members of the firm of Dresser & Co., in a proceeding then and now pending in the district court of the United States for the southern district of New York,
3 entitled "In the matter of Daniel Le Roy Dresser and Charles E. Riess, individually and as members of the firm of Dresser & Co., bankrupts, No. 5728." On September 29, 1903, your orator duly qualified as such trustee, and ever since has been and now is acting as trustee in bankruptcy of the said Dresser and the said Riess individually and as members of the said firm of Dresser & Co. aforesaid. At the time hereinafter mentioned, and up to March 7th, 1903, the said Dresser and Riess were carrying on business as merchants under the firm name of Dresser & Co., at Nos. 15 and 17 Greene street, in the borough of Manhattan, city of New York.

2. The defendant, The Security Warehousing Company, at the times hereinafter mentioned, was and is a corporation, organized and existing under and by virtue of the laws of the State of New York.

3. The defendant, The United States Mortgage and Trust Company, at the times hereinafter mentioned, was and is a corporation organized and existing under and by virtue of the laws of the State of New York.

4. In and about some or all of the matters and things in this complaint referred to and set forth as done by him, the defendant, Charles H. Wenman acted as the agent and attorney in fact of the defendants, Stuyvesant Fish and George C. Boldt, and Fish and Boldt were the principals of said Wenman with respect to some or all of his dealings with the firm of Dresser & Co. and the members thereof, and with respect to some or all of the dealings of Wenman with any and all of the defendants in this suit, as in this bill set forth, and some or all of the moneys paid to him were or should have been paid over, less whatever may have been his agreed
4 compensation as such agent and attorney, to his said principals.

5. Prior to March 7, 1903, the bankrupts, Daniel Le Roy Dresser and Charles E. Riess, individually and as members of the firm of Dresser & Co., became insolvent, and on that day they assigned all of their property individually and as members of the said firm to Charles S. Mackenzie, as assignee, for the benefit of their creditors, and on March 9, 1903, upon the petition of certain creditors of the bankrupts, Robert C. Morris and Charles S. Mackenzie were duly appointed by the district court of the United States for the

southern district of New York, receivers in bankruptcy of the firm of Dresser & Co. and of the said Dresser and Riess individually.

6. For at least six months prior to the 7th day of March, 1903, the firm of Dresser & Co., and its members had been insolvent, and unable to pay their debts, and were only able to continue in business by borrowing large sums of money to secure which, without injury to their credit, it became necessary to pledge the goods, wares and merchandise in which they were dealing, but at the same time, to conceal from their unsecured creditors the fact that the same were pledged. The goods, wares and merchandise, so dealt in by the firm of Dresser & Co., consisted for the most part of Japanese silk, imported by it for sale.

7. For the purpose of pledging these goods with certain of their creditors, without the knowledge of their other creditors, Dresser & Co. entered into the following plan and arrangement with the defendant, The Security Warehousing Company:

5 A certain alleged lease of their store, display and sales room at 15–17 Greene street in the city of New York, was made by Dresser & Co. to the Security Warehousing Co., at a nominal rental of one dollar per year, in order that thereafter the Security Warehousing Co. might claim and pretend that the store and the display and sale room belonged to it, that it was one of its warehouses, and that all of the goods therein, belonging to the firm of Dresser & Co., had been delivered to it for storage in its said pretended warehouse.

8. There was no change of location or custody of the said goods, but Dresser & Co. remained in possession and control thereof, and sold and disposed of them in the same manner and in the same way as that firm had previously done prior to the pretended storing, exhibiting the same to their customers, sending such portions as it desired to the dyers and manipulators, and generally handling and using the said goods as if they were unpledged, and free and clear of all liens or other incumbrances.

9. The Security Warehousing Company exercised no supervision or control over said goods, but it nominally employed or pretended to employ one Gertrude B. Fish, the confidential clerk and secretary of Daniel Le Roy Dresser and Dresser & Co., as its alleged custodian, in whose charge it was claimed the goods had been placed, paying her, or contracting to pay her, a so-called salary of one dollar a month. She exercised no control or supervision over said goods, and during the entire period, while it is claimed she was so employed, she continued to act as the confidential clerk and secretary of Dresser & Co. and of Daniel Le Roy Dresser. The Security

6 Warehousing Company also placed a few small tags on certain of the shelves, bins and counters, on which the silk goods were stored, and displayed for sale, upon which tags the name of the Security Warehousing Co. was printed, but the tags were not easily discernible, and in almost all instances were so turned and placed as not to be readily seen, and were not so affixed as to identify the

goods which it was claimed and pretended were represented by the several security instruments held by the defendants and hereinafter referred to.

10. After Dresser & Co. had thus pretended to store the said goods with the Security Warehousing Company by means of the foregoing secret arrangements, the Security Warehousing Company prepared certain instruments in writing (which for the sake of brevity are herein referred to as security instruments) in the general form of warehouse receipts, purporting on their face to be warehouse receipts, and representing that certain goods had been stored with it at its warehouse, Nos. 15–17 Greene street, in the city of New York (which was in fact the store of Dresser & Co.)

11. The security instruments did not describe the goods, purported to be covered thereby, in such a way as to render them capable of identification, but merely stated that goods of a certain quality, value and amount had been stored, and it was impossible by an inspection of any one of the security instruments or in any other way to determine what goods were represented by it.

12. These security instruments were delivered to Dresser & Co., and some were delivered in turn to the Security Warehousing Co., some to the United States Mortgage and Trust Company, and
7 some to the defendant Wenman for himself or for the defendant- Fish and Boldt, and some to other parties, with the intent or pretense to secure certain loans then claimed to be made, or which they claimed had been made to Dresser & Co.

13. All of the security instruments outstanding on the 9th of March, 1903, were held by the defendants herein.

14. Daniel Le Roy Dresser was one of the incorporators of the defendant, The Security Warehousing Company, and from the time of its organization, and until after the 7th day of March, 1903, he was one of its directors and stockholders, and he was influential in the management and conduct of its business.

15. At the times of the delivery of the security instruments, Charles S. Mackenzie, had been for some time, and during all the times mentioned in this bill, he continued to be the general counsel of the defendant, The Security Warehousing Company, and was fully cognizant of the details of its business and of its system of pretended storage hereinbefore described, and he was also the personal counsel and confidential representative of Daniel Le Roy Dresser.

16. After the delivery of the security instruments to the defendants, Dresser & Co. continued to display for sale and to sell and dispose of the goods so pretended to be stored as aforesaid, and to send the same to be dyed and otherwise manipulated, in the same manner and in the same way as they had been in the habit of doing prior to the said pretended storing, to all of which neither the Security Warehousing Company nor any of the defendants made any objections; nor did they make any effort to prevent the sale and dis-

position of the goods, and the management and control thereof by Dresser & Co.

8 17. At the times of the delivery of the security instruments to the defendants, they all knew, or ought to have known, that the store, sale and display room at Nos. 15–17 Greene street was not the warehouse of the Security Warehousing Company, but that it was the store and display room of Dresser & Co., and that the goods therein located were not in the custody of the Security Warehousing Company, but were in the custody and control of the firm of Dresser & Co.; they all knew or ought to have known that the goods were being sold, disposed of and otherwise managed by Dresser & Co. as in the preceding paragraph described.

18. When the receivers, Morris and Mackenzie, went into possession of the store, the display and the sales room of Dresser & Co. on the 9th day of March, 1903, upwards of $150,000. worth of the goods belonging to that firm were still there, and in the possession and under the control of Dresser & Co. After the receivers had taken possession of the store, the defendant, The Security Warehousing Company, notified them that it claimed that the store, sales and display room belonged to it, under the alleged lease, and that the goods therein contained had been stored with it by the firm of Dresser & Co., and it demanded the delivery of all of the goods.

19. The receivers did not dispute this claim of the Security Warehousing Co., but acquiesced therein and complied therewith.

20. Neither the court nor the unsecured creditors of Dresser & Co. were advised of the facts concerning this claim, nor the character of the pretended storing upon which the so-called warehouse receipts were based.

9 21. Thereafter the Security Warehousing Company, and the receivers, the said Morris and Mackenzie, entered into certain agreements under which some of the goods were sold by the latter, as the agents of that company, and the proceeds thereof paid over by them to it, without notice to the other creditors of the firm of Dresser & Co., and without any memoranda, account or statement of what moneys were received from the sale of the goods claimed to be represented by any one of the security instruments. The balance of the said goods were sold by the Security Warehousing Co. through other agents, and without notice to the other creditors of Dresser & Co.

22. In addition to the goods, in the possession of the firm of Dresser & Co. at the time of its failure, the Security Warehousing Company claimed to Morris and Mackenzie that certain of the goods, so claimed to have been stored with it, and represented by said security instruments, had been sold by the firm of Dresser & Co. prior to the 7th day of March, 1903. The amount of said goods, so claimed to have been sold, is unknown to your orator, but he has been informed by Morris and Mackenzie, and he therefore charges it to be true, that it exceeded in value the sum of $22,000., and that thereafter and subsequent to the 9th day of March, 1903, they collected

certain accounts receivable of the firm of Dresser & Co., of upwards of $20,000., and paid over the same to the defendant The Security Warehousing Company, without notice to the other creditors of Dresser & Co.

23. All of these silk goods were sold and all of these accounts receivable were collected by the Security Warehousing Company prior to the appointment of your orator as trustee in bankruptcy of Dresser & Co.; and none of the goods or their proceeds or of the accounts receivable have come into his possession, except the sum of one thousand nine hundred and forty-four 93/100 dollars ($1,944.93) paid to your orator by the Security Warehousing Co.

24. A large part of the proceeds of the goods sold and paid over to it and of the accounts receivable collected and paid over to it by Morris and Mackenzie, and of the goods sold by it through other agents, were in turn paid over by the Security Warehousing Co. to the other defendants herein, as the holders of said security instruments, and the balance of said proceeds were either retained by the Security Warehousing Co. or improperly disbursed by it.

25. The security instruments, under which part of the goods were sold and the accounts receivable were collected by Morris and Mackenzie, and their respective proceeds paid over by them to the Security Warehousing Co. and under which the balance of the goods were sold by it through other agents and by it retained or paid out as aforesaid, were and are invalid and of no force and effect, as against your orator, for the reason that they, and the pretended storing of the goods with the Security Warehousing Co. upon which they are based, constitute an attempt to create a lien thereon, in favor of the holders thereof, contrary to the law and statutes of the State of New York.

26. The goods and the proceeds thereof, together with the accounts receivable collected and paid over by the receivers, constituted a portion of the estate of Dresser & Co. and are a trust fund of which the plaintiff as trustee in bankruptcy is and was trustee for
11 the benefit of the credi- of the firm of Dresser & Co., which fund has been diverted by the Security Warehousing Company to its own use, and to the use of the other defendants herein.

27. The books and records of the Security Warehousing Company containing all of the entries and information concerning the sale and the disposition of said goods, and the proceeds thereof, and of the said accounts receivable, have all been lost or destroyed, through the negligence or other wrongful act of the defendant, The Security Warehousing Company, and no copies thereof are in existence, nor are there any books, records, memoranda, or other sources from or by means of which your orator can ascertain the facts concerning said sale and disposition.

28. Because the security instruments delivered to the various defendants herein by Dresser & Co. and the pledging of the goods, claimed to be represented thereby, are valid as between the defend-

ants holding the said instruments and the firm of Dresser & Co., it is only by recourse to your honors that your orator, as trustee for the creditors of the firm, can have the same declared void, as being an attempt to create a lien upon said goods, contrary to the law and statutes of the State of New York.

29. All of the goods were commingled and sold without regard to the security instruments, purporting to cover them, and the proceeds were distributed by the Security Warehousing Company without regard to the particular goods from the sale of which they came, so that if any or all of the security instruments should for any reason be held to be valid as against your orator, it is impossible (by reason of this commingling, and of the facts in paragraph 27 set
12 forth and of the failure to properly describe the goods in the security instruments themselves) to ascertain whether the defendant holders thereof received the proceeds of the goods covered thereby and whether or not there was a surplus over and above the loans claimed to be secured by the same respectively, or whether or not the said defendant holders or any of them are accountable to your orator for such surplus, so that only from your honors can your orator receive proper and adequate relief with respect to said security instruments, the transactions represented thereby, and the rights of the various parties therein and thereto.

30. The silk goods were, for the most part, sold at prices below their actual value and for much less than they could have been disposed of at a properly advertised public sale. The price for which each particular lot of said goods was sold is unknown to your orator, but the net amount realized therefrom was less than $125,000, while the aggregate value of said goods as stated in said security instruments amounted to more than $150,000. The values placed upon the said goods in said security instruments represented the cost price thereof to the firm of Dresser & Co., which cost price averaged from 20 % to 40 % less than the market value thereof at which the firm of Dresser & Co. had been accustomed and were able to sell them in the city of New York and elsewhere.

31. With respect to the said goods and the proceeds thereof, and the said accoubts receivable constituting the said trust fund so diverted by the Security Warehousing Company as aforesaid, your orator is the trustee of an express trust for the benefit of the
13 creditors of the firm of Dresser & Co., and as such is entitled to protection from your honors, and to seek relief therefrom against the defendants, who have all participated in the diversion of his trust estate by means of the aforementioned secret and illegal transactions; and your orator, as such trustee as aforesaid, is further entitled, in case any of said transactions be decreed to be valid, to relief in equity against the said defendants, by reason of the improper and improvident sale and distribution of the portion of the said fund included in said transactions, so decreed to be valid, and

to the determination by your honors of his rights with respect thereto.

Your orator prays that the security instruments, in the foregoing bill described, be decreed invalid, fraudulent, and void with respect to your orator, and that he be decreed the owner of the goods and accounts receivable purporting to be covered thereby, and that the defendants be decreed to pay over to your orator any and all of the goods or the proceeds thereof, and the proceeds of the said accounts receivable, purporting to be covered by the said security instruments which shall appear to have been taken or received by them respectively or by their agents or representatives, and that it be decreed, in case the specific goods and accounts receivable can not be delivered to your orator by the defendants, that your orator recover from the defendants the market value of the goods taken by them respectively at the time of the taking, together with the proceeds of the accounts receivable so taken by them, together with interest thereon; and that in case any of the security instruments
are decreed valid and effective as against your orator, and
14 that the defendants or any of them were entitled to hold and
sell the goods and to collect the accounts receivable covered thereby, then and in that event that it be decreed that the said defendants and each of them make full disclosure and discovery to your orator of all the acts and things done by each and all of them, with respect to said goods and their sale, and the accounts receivable, and of the disposition of the proceeds thereof; and that the defendants pay over to your orator, in addition to the said sum of $1,944.93 already paid to him by the Security Warehousing Co., such amounts with interest as it may be decreed have been received by each of them respectively in excess of the amount to which they are entitled as the proceeds of the sales of said goods and the collection of the accounts receivable upon which they respectively had liens, and also such amounts with interest as it may be decreed are due your orator by reason of the improvident sale of said goods, and that your orator have such further and other relief as the nature of the circumstances of this case may require, and to your honors shall seem meet.

Your orator further prays that your honors may grant unto your orator a writ of subpœna of the United States of America, issued out of and under the seal of this honorable court, directed to the defendants, Charles S. Wenman, Stuyvesant Fish, George C. Boldt, Security Warehousing Company and United States Mortgage and Trust Company, commanding the said Wenman, Fish, Boldt, Security Warehousing Company and United States Mortgage and Trust Company at a certain time and under a certain penalty therein
to be named, personally to be and appear before this honor-
15 able court, then and there to answer all and singular (but
not under oath, answer under oath being hereby expressly waived) the matters aforesaid, and to stand and abide by and sus-

tain such direction and decree as shall be made herein, as to your honors shall seem equitable and just.

EDWARD B. WHITNEY,
Complainant.

ROBERT D. MURRAY,
Solicitor for Complainant; Office and Post Office Address, 30 Broad Street, New York City, New York.

R. D. MURRAY,
J. ASPINWALL HODGE,
GEORGE H. GILMAN,
Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

On this second day of November, 1904, before me personally appeared Edward B. Whitney, the above named plaintiff, who made solemn oath that he had read the foregoing bill of complaint, subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

WM. C. FOSTER,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Endorsed: Bill of complaint. Filed Nov. 7th, 1904. All of the demurrers sustained. Memorandum filed. Feb'y 7, 1905. G. C. H.

16 District Court of the United States, Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Plaintiff,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. Boldt, Security Warehousing Co., and United States Mortgage & Trust Co., Defendants.
} In Equity. No. —.

To Thomas Alexander, Esq., clerk of district court of the United States, southern district of New York:

You will please enter my appearance in the above entitled suit for the defendants Charles H. Wenman, Stuyvesant Fish and George C. Boldt.

Dated December 6th, 1904.

Yours, &c.,
LOUIS F. DOYLE,
Solicitor for Defendants Wenman, Fish, and Boldt, 41 Park Row, Borough of Manhattan, City of New York.

Endorsed: Præcipe for appearance on behalf of C. H. Wenman, S. Fish and G. C. Boldt. Filed Dec. 6th 1904.

17 District Court of the United States. Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co.,

against

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage & Trust Company.

To the clerk of the United States district court for the southern district of New York:

SIR: Please enter our appearance as solicitors for defendant, The Security Warehousing Company, in the above entitled suit.

Yours, &c., SMITH & BARKER,
Solicitors, 56 Pine Street, New York.

Endorsed: Appearance of defendant Security Warehouse Co. Filed Dec. 5, 1904.

18 The District Court of the United States in and for the Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co.,

against

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage and Trust Company.

Please take notice that the respondent, United States Mortgage and Trust Company appears in this action by us as its solicitors.
Dated November 29, 1904.

ROLLINS — ROLLINS,
32 Nassau St., New York, N. Y.

To Thomas Alexander, Esq., clerk of the United States district court for the southern district of New York, and Robert D. Murray, Esq., solicitor for complainant, 30 Broad street, New York city.

Endorsed: Notice of appearance. Filed Dec. 2, 1904.

19 United States District Court, Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Company, and United States Mortgage & Trust Company, Defendants.
} In Equity. No. —.

Demurrer to Bill for Want of Jurisdiction.

The defendant Charles H. Wenman by protestation, not confessing or acknowledging all or any of the matters or things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill of complaint, and for cause of demurrer showeth:

That it appears upon the face of the said bill of complaint that this court has not jurisdiction to take or have cognizance thereof or of the matters or things in the said bill of complaint alleged or of this cause.

Wherefore the said defendant prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill of complaint or to the matters and things therein contained, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

LOUIS F. DOYLE,
Solicitor and of Counsel for Defendant Charles H. Wenman,
41 Park Row, Borough of Manhattan, City of New York.

20 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

LOUIS F. DOYLE,
Of Counsel for Defendant Charles H. Wenman.

STATE OF NEW YORK, County of New York, } ss:

Charles H. Wenman being duly sworn deposes and says: I am one of the defendants to the above entitled suit. The foregoing demurrer is not interposed for delay.

CHARLES H. WENMAN.

Subscribed and sworn to before me this 29th day of December, 1904.

[SEAL.]

THOMAS KEANEY,
Notary Public, New York County.

Endorsed: Demurrer for want of jurisdiction. Filed Jan'y 3, 1905.

21 United States District Court, Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Company, and United States Mortgage & Trust Company, Defendants.
} In Equity. No. —.

Demurrer to Bill for Want of Jurisdiction.

The defendant Stuyvesant Fish by protestation, not confessing or acknowledging all or any of the matters or things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill of complaint, and for cause of demurrer showeth:

That it appears upon the face of the said bill of complaint that this court has not jurisdiction to take or have cognizance thereof or of the matters or things in the said bill of complaint alleged or of this cause.

Wherefore the said defendant prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill of complaint or to the matters and things therein contained, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

LOUIS F. DOYLE,
Solicitor and of Counsel for Defendant Stuyvesant Fish,
41 Park Row, Borough of Manhattan, City of New York.

22 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

LOUIS F. DOYLE,
Of Counsel for Defendant Stuyvesant Fish.

STATE OF NEW YORK,
County of New York, } ss.:

Stuyvesant Fish being duly sworn deposes and says: I am one of the defendants to the above entitled suit.

The foregoing demurrer is not interposed for delay.

STUYVESANT FISH.

Subscribed and sworn to before me this 29th day of December, 1904.

[SEAL.] THOMAS KEANEY,
Notary Public, New York County.

Endorsed: Demurrer for want of jurisdiction. Filed Jan'y 3, 1905.

23 United States District Court, Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Company, and United States Mortgage & Trust Company, Defendants.
} In Equity. No. —.

Demurrer to Bill for Want of Jurisdiction.

The defendant George C. Boldt by protestation, not confessing or acknowledging all or any of the matters or things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill of complaint, and for cause of demurrer showeth:

That it appears upon the face of the said bill of complaint that this court has not jurisdiction to take or have cognizance thereof or of the matters or things in the said bill of complaint alleged or of this cause.

Wherefore the said defendant prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill of complaint or to the matters and things therein contained, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

LOUIS F. DOYLE,
Solicitor and of Counsel for Defendant George C. Boldt,
41 Park Row, Borough of Manhattan, City of New York.

24 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

LOUIS F. DOYLE,
Of Counsel for Defendant George C. Boldt.

STATE OF NEW YORK, County of New York, } *ss.*:

George C. Boldt being duly sworn deposes and says: I am one of the defendants to the above entitled suit. The foregoing demurrer is not interposed for delay.

GEO. C. BOLDT.

Subscribed and sworn to before me this 29th day of December, 1904.

[SEAL.] H. C. TUXBURY,
Notary Public, N. Y. Co.

Endorsed: Demurrer for want of jurisdiction. Filed Jan'y 3, 1905.

25 District Court of the United States for the Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co.,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. Boldt, The Security Warehousing Company, and United States Mortgage & Trust Company.
} In Equity.

Demurrer to Bill for Want of Jurisdiction.

This defendant, The Security Warehousing Company, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer showeth :—

That this court hath not jurisdiction to take and have cognizance of said bill and of the matters and things as therein alleged and of this cause.

Wherefore this defendant, The Security Warehousing Company, demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill, or of the matters and things therein contained, and prays to be hence dismissed with its costs in this behalf sustained.

SMITH & BARKER,
Solicitors for the Defendant The Security Warehousing Company, 56 Pine Street, New York City.

26 We hereby certify that the foregoing demurrer is, in *my* opinion, well founded in point of law.

EDWIN B. SMITH,
S. B. CLARKE,
Of Counsel for the Defendant,
The Security Warehousing Company.

New York, December 28th, 1904.

STATE OF NEW YORK,
City and County of New York,
Southern District of New York, } ss.:

George B. Wing, being duly sworn deposes and says that he is the secretary of The Security Warehousing Company, one of the above named defendants, and that the foregoing demurrer is not interposed for delay.

GEORGE B. WING.

Sworn to before me this 28th day of December 1904.

[Seal of Gertrude W. Martling, Notary Public, New York County.]

GERTRUDE W. MARTLING,
Notary Public (171), N. Y. County.

Endorsed: Demurrer. Filed Dec. 29, 1904.

27 United States District Court, Southern District of New York.
In Equity.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co.,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage & Trust Company.

Robert D. Murray, Aspinwall Hodge and George H. Gilman, for complainant.

Louis F. Doyle, for defendants Wenman, Fish & Boldt.

Edwin B. Smith and Samuel B. Clarke, for defendant Security Warehousing Company.

HOLT, J.:

This court has no general equity jurisdiction. The only provisions of the bankrupt act directly authorizing a trustee in bankruptcy to sue in this court, except by the consent of the defendant, are secs. 60*b*, 67*e* and 70*e*. All those sections relate to suits to recover property transferred by the bankrupt before adjudication. This suit is brought to recover property transferred by the receivers after adjudication. The only ground, therefore, in my opinion, upon which any plausible claim can be made that this court has jurisdiction in this case is that the property sought to be recovered was at one time *in custodia legis*. The rule is well settled that every court has an exclusive right to determine the distribution of a fund in its custody (*Re* Antigo Screen Door Co., 123 Fed. Rep., 249). But, in substance,

the complaint alleges and the demurrer admits that the Security Warehousing Company, before the bankruptcy, had taken a lease of the bankrupt's premises, had appointed a custodian of the
28 property, who was upon the premises, and had affixed to the goods tags asserting ownership; that when the receivers were appointed, it claimed that the store, sales and display room belonged to it, under the alleged lease, and that the goods therein contained had been stored with it by Dresser & Co.; that it had issued warehouse receipts upon the goods, which had been taken by the other defendants, apparently in good faith; that it demanded from the receivers the custody and delivery of all the goods; that the receivers did not dispute this claim, but acquiesced therein, and complied therewith; that agreements were entered into between the Security Warehousing Company and the receivers, under which some of the goods were sold by the receivers as the agents of the company, and some by the company through other agents. Under these circumstances I do not think it sufficiently appears on the face of the complaint that these goods were ever strictly *in custodia legis*. The receivers found some one else at the bankrupts' store claiming adversely, and apparently acquiesced in the claim. In order to authorize a court to entertain jurisdiction to recover from outside parties, by legal proceedings, property, the possession of which has been voluntarily relinquished by officers of the court, in acquiescense in an adverse claim, it must clearly appear that the property was previously absolutely in the custody of the court; and taking all the allegations of the complaint together, I do not think that that fact satisfactorily appears on the face of the complaint. The circumstances connected with the execution of the lease, the appointment of the custodian, the tagging of the goods, and the method in which the business was thereafter conducted as alleged in the complaint, undoubtedly make a strong
29 case for attacking the validity of the transaction, but what was done was intended to put, and is claimed by the defendants to have put, the legal title to the property in the Security Warehousing Company, and, in my opinion, did, in fact, put an apparent or colorable title in that company, which could not be simply disregarded and brushed aside as a sham in the bankruptcy proceedings. If the receivers had not acquiesced in the claim of the security company, a suit in equity or at least a proceeding in bankruptcy would have been necessary to reach the property claimed by the security company, and therefore I think that the receivers, when they took the bankrupts' property into their custody, took it subject to the claims of the security company, and that this court has never had the property in its custody free from such claims.

My conclusion is that the demurrer should be sustained.

February 7, 1905.

30 United States District Court, Southern District of New York.
In Equity.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the firm of Dresser & Co., Plaintiff,

against

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, Security Warehousing Company, and United States Mortgage and Trust Company, Defendants.

The defendants Charles H. Wenman, Stuyvesant Fish and George C. Boldt, appearing by Louis F. Doyle, Esq., their solicitor, and the defendant The Security Warehousing Co. appearing by Messrs. Smith & Barker, its solicitors, having separately demurred to the bill of complaint herein on the ground that this court has not jurisdiction to entertain this suit, and the said demurrers having been argued by counsel and this court having been fully advised in the premises and being of the opinion that the said demurrers should be sustained, now it is

Ordered, adjudged and decreed that the demurrers of the said defendants above named and each of them, be and the same hereby are sustained and the bill of complaint herein dismissed on the ground that this court has not jurisdiction to entertain this suit, and it is further

Ordered, adjudged and decreed that the bill of complaint herein be and the same hereby is dismissed with costs to the several
31 defendants appearing by separate solicitors, to wit, to the defendants Charles H. Wenman, Stuyvesant Fish and George C. Boldt, appearing by Louis F. Doyle, Esq., and to the Security Warehousing Co. appearing by Messrs. Smith & Barker.

GEO. C. HOLT, J.

Endorsed: Decree sustaining demurrer and dismissing bill Filed Feb'y 21, 1905.

32 United States District Court, Southern District of New York.
In Equity.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,

against

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage and Trust Company, Defendants.

In this cause I hereby certify that the final decree dismissing the bill herein, and sustaining the demurrer thereto, dated the 20th day of February, 1905, is based solely on the ground that upon the facts

disclosed by the said bill the bankruptcy act (act of July 1st, 1898, chapter 541, as amended by act of February 5th, 1903, chapter 487) gives this court no jurisdiction over the parties to this controversy without the consent of the defendants, which has not been given, and that no other ground of jurisdiction under the statutes and Constitution of the United States appears upon the record of this cause.

This certificate is made in conformity to the act of Congress of March 3rd, 1891, chapter 517, and the opinion filed herein is made a part of the record, and will be certified and sent up as a part of the proceedings, together with this certificate.

At the request of the complain-t, an appeal to the Supreme Court of the United States is hereby allowed under the said act of Congress (chapter 517, act March 3rd, 1891).

February 28, 1905.

GEO. C. HOLT,
Judge of the District Court of the United States,
Southern District of New York.

Endorsed: Certificate. Filed March 2, 1905.

33 District Court of the United States for the Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Company, and United States Mortgage and Trust Company, Defendants.
} Petition for Appeal.

The above named complainant, conceiving himself aggrieved by the order and decree made and entered in this cause on the 20th day of February, 1905, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, may be sent to the Supreme Court of the United States.

February 28th, 1905.

ROBERT D. MURRAY,
Solicitor for Complainant,
No. 30 Broad Street, New York City, New York.

The foregoing appeal is hereby allowed.
Dated, Feb'y 28, 1905.

GEO. C. HOLT,
Judge of the District Court of the United States
for the Southern District of New York.

Endorsed: Petition for appeal. Filed March 2 1905

34 District Court of the United States for the Southern District of New York.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant,
against
CHARLES H. WENMAN, STUYVESANT FISH, George C. Boldt, The Security Warehousing Co., and United States Mortgage and Trust Co., Defendants.
} Assignment of Errors.

The complainant prays an appeal from the final decree of this court, dated the 20th day of February, 1905, to the Supreme Court of the United States, and assigns for error:

First. That the district court of the United States for the southern district of New York erred in sustaining the demurrers to the bill herein and dismissing the bill on the ground that the said district court did not have jurisdiction to entertain this suit.

Second. That the district court of the United States for the southern district of New York erred in dismissing the bill herein with costs to the several defendants appearing by separate solicitors.

Third. That the district court of the United States for the southern district of New York erred in not dismissing the demurrers herein and sustaining the bill on the ground that the said district court had jurisdiction of this suit.

35 Fourth. That the district court of the United States for the southern district of New York erred in not sustaining the bill herein with costs to the complainant.

February 28th, 1905.

ROBERT D. MURRAY,
Complainant's Solicitor,
No. 30 Broad Street, Borough of Manhattan,
City of New York, New York.

Endorsed: Assignment of errors. Filed March 2, 1905.

36 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles H. Wenman, Stuyvesant Fish, George C. Boldt, the Security Warehousing Company, and United States Mortgage and Trust Company, Greeting:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States, to be holden at Washington, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the district court of the United States for

the southern district of New York, wherein Edward B. Whitney as trustee in bankruptcy of Daniel Le Roy Dresser and Charles E. Riess as members of the firm of Dresser & Co. is appellant and you are appellees, to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States this first day of March, 1905.

GEO. C. HOLT,
Judge of the District Court of the United States
for the Southern District of New York,
in the Second Circuit.

37 Service of the within citation and receipt of a copy thereof is hereby admitted this 2nd day of March, 1905.

LOUIS F. DOYLE,
Solicitor for Wenman, Fish, and Boldt, Appellees.
SMITH & BARKER,
Solicitors for Appellee The Security Warehousing Co.
ROLLINS & ROLLINS,
Solicitors for Appellee United States Mortgage
& Trust Company.

Endorsed: Citation. Filed M'ch 9/05.

38 UNITED STATES OF AMERICA,
Southern District of New York, } ss:

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., Complainant-Appellant,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, The Security Warehousing Company, and United States Mortgage and Trust Company, Defendants-Appellees.

I, Thomas Alexander, clerk of the district court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing appeal and the allowance thereof and in obedience thereto, do hereby certify that the foregoing pages numbered from two (2) to thirty-eight (38) inclusive, contain a true and complete transcript of the record and proceedings had in said district court in the above-entitled cause as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 16th day of March, in the year of our Lord one

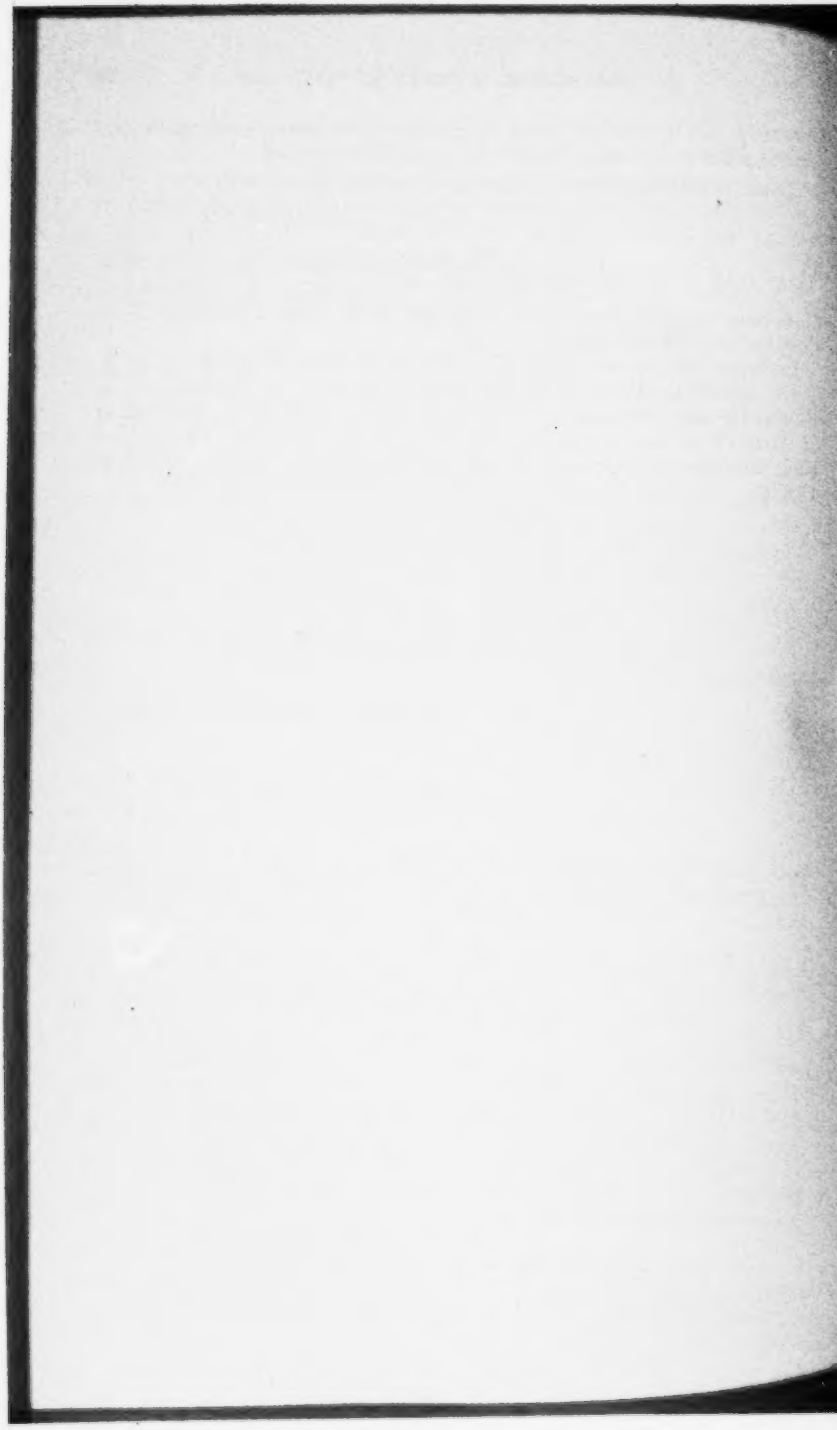
thousand nine hundred and five and of the Independence of the United States the one hundred*th* and twenty-ninth.

[Seal District Court of the United States, Southern District of N. Y.]

THOS. ALEXANDER, Clerk.

39 [Endorsed :] U. S. district court, southern district of New York. Edward B. Whitney, as trustee, etc., complainant-appellant, against Charles H. Wenman *et al.*, defendants-appellees. Certified record on appeal.

Endorsed on cover: File No. 19,676. S. New York D. C. U. S. Term No. 576. Edward B. Whitney, as trustee in bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as members of the firm of Dresser & Co., appellant, *vs.* Charles H. Wenman, Stuyvesant Fish, George C. Boldt, *et al.* Filed March 22d, 1905. File No. 19,676.



Supreme

EDWARD H. WHITNEY et

LE ROY DENSMORE and CHARLES

bers of the firm of Densmore &

vs.

CHARLES H. WEAVER, STUYVESANT

C. BOLDT, THE SECURITY

and UNITED STATES

Brief and Argument

Appeal under Section

Chapter 517,

Bill for Lack of

Robert D. Murphy,

George H. Gifford,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

EDWARD B. WHITNEY as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as members of the firm of Dresser & Co.,

Appellant,

against

CHARLES H. WENMAN, Stuyvesant Fish, George C. Boldt, The Security Warehousing Co., and United States Mortgage and Trust Co.,

Appellees.

Brief and argument on behalf of Appellant on appeal under Section 5 of Act March 3d, 1891, Chapter 517 from final decree, dismissing the bill herein for lack of jurisdiction.

Statement.

This is an appeal by the complainant direct to this court from the District Court of the United States for the Southern District of New York,

taken under the provisions of Subdivision 1, Section 5, Chapter 517, Act of March 3d, 1891 (26 Stat. L., 826), from a final decree which sustained a demurrer and dismissed the complainant's bill on the ground that there was no jurisdiction in the court to entertain it without the consent of the defendants which had not been given.

The judge of the district court has certified that the demurrer was sustained and the bill dismissed *only* on the ground that the court did not have jurisdiction of the suit, and he has allowed this appeal (Record, pp. 17-18).

The complainant sued as the trustee in bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, copartners under the name of Dresser & Co., silk and commission merchants in the City of New York.

The bill filed by the complainant, and which has been dismissed, discloses the following facts (which are admitted by the demurrers), upon which he bases his prayer for relief:

Dresser & Co. failed on the 7th day of March, 1903, and, on the 9th day of March, 1903, receivers in bankruptcy were appointed (Record, pp. 2–3).

The complainant was appointed trustee of the bankrupt estate on the 17th day of September, 1903, and on the 29th of the same month he duly qualified as such trustee (Record, p. 2).

For a considerable time before March 7th, 1903, Dresser & Co. and the members of the firm had been insolvent, and they were only able to continue their business by borrowing large sums of money upon the security of the silk which they owned and at the same time concealing this borrowing from their other creditors (Record, p. 3).

In order to do this Dresser & Co. made the following arrangement with the defendant The Security Warehousing Co.

Dresser & Co's. store was at Nos. 15–17 Greene street, New York City. A pretended lease of this store was made by the firm to The Security Warehousing Co., one of the appellees, at a nominal rental of *one dollar* a year in order that it might claim that the store was one of its warehouses and that Dresser & Co's. goods had been delivered by them to it for storage there. As soon as the so-called lease was made The Security Warehousing Co. gave to Dresser & Co. certain papers in the general form of warehousing receipts purporting to cover silk in amounts equal to that which was in Dresser & Co's. store (Record, pp. 3–4).

These so-called warehouse receipts were then given by Dresser & Co. to the defendants either as security for alleged loans which had already been made or which were then alleged to have been made to the firm (Record, p. 4). The relations of the defendants to Dresser & Co. were such that they either knew or were charged with notice of all the facts in connection with the so-called storing (Record, p. 5).

There was no change of possession or control of the silk contained in the Dresser store and pretended by the Security Warehousing Co. to have been stored with it (Record, p. 3).

All that was done was this:

A so-called custodian—, a Miss Fish, the private secretary and confidential clerk of the bankrupt Dresser—was employed at a *salary of one dollar a month* by the Security Warehousing Co. to represent it in the care and custody of the silk. She exercised no control or supervision over the silk,

and she continued to act as the confidential clerk and secretary of Dresser & Co. (Record, p. 3).

That firm continued in possession of the silk and to display and sell it as their own, to send it to the dyers for manipulation, and generally to treat it in the same manner as they had been in the habit of doing prior to the pretended storing (Record, p. 3).

A few small tags, bearing the name of The Security Warehousing Co. were placed upon the bins, shelves and counters where the silk was displayed for sale and stored, They were not easily discernible and in most instances were placed so they were not easily seen. The tags were not worded in such a way as to identify the silks with the so-called warehouse receipts which pretended to cover them, nor did the receipts themselves describe the silks which they pretended to cover in such a way as to render them capable of identification (Record, pp. 3-4).

Under these circumstances it has been repeatedly held by the Court of Appeals of New York that the holder of such a pretended warehouse receipt acquires no rights to the property enumerated therein which are superior to the rights of creditors. The transaction is held to be an attempt to create a chattel mortgage void as against creditors, for want of filing or change of possession. *

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*Yenni vs. McNamee, 45 N. Y., 614.
Button vs. Rathbone, 126 N. Y., 187.
N. Y. Lien Law (Laws 1897, Ch. 418, as amended Laws 1900, Ch. 248).

Section 90: Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, or of any canal boat, steam tug, scow or other

The foregoing shows the condition of affairs with respect to the so-called storing under the pretended warehouse receipts when the receivers of Dresser & Co. were appointed.

What happened afterwards was this:

One of the receivers, Charles S. Mackenzie, was and had been the general counsel of the Security Warehousing Co., and he was the personal counsel and adviser of the bankrupt Dresser. He continued as such general counsel during the entire period of his receivership. Dresser himself was one of the incorporators and a director and stockholder of the Security Warehousing Co., and he was influential in its management and control (Record, p. 4).

When the receivers took possession of the store of Dresser & Co. they found there a large quantity of silk, owned by and in the possession of Dresser & Co., valued at more than $150,000 (Record, p. 5).

After the receivers had taken possession of the property of the bankrupts the Security Warehousing Co. notified them that the store had been leased by it and that all of the silk goods which were there had been delivered to it for storage,

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craft, or the appurtenances thereto, navigating the canals of the State, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof is filed as directed in this article.

and a demand was made by it that the receivers deliver the goods to it (Record, p. 5).

The receivers acquiesced in this claim and complied with it. They did not notify the creditors or the court of the character of the pretended storage nor of the claim, although one of them at least, McKenzie, was entirely familiar with all of the details thereof (Record, p. 5).

Upon further examination it was ascertained by the receivers and The Security Warehousing Co., that there was more silk called for by the outstanding warehouse receipts than there was on hand in Dresser & Co's. store. This deficiency in silk amounted to upwards of Twenty thousand dollars (Record, p. 5).

Thereupon a secret arrangement was entered into between the receivers, acting through Mackenzie and The Security Warehousing Co., without the knowledge of the creditors, under which most of the silk was sold by the receivers as the agents of The Security Warehousing Co., and the proceeds paid over to it The balance of the silk was sold by The Security Warehousing Co. through other agents (Record, p. 5).

Under a further secret arrangement, and presumably to protect The Security Warehousing Co. against the deficiency in silk above mentioned, the outstanding accounts of Dresser & Co. were collected by the receivers and the proceeds also turned over to The Security Warehousing Co., until the value of the missing silk was made up (Record, pp. 5-6).

As has been stated, there was nothing on the face of the warehouse receipts to show the particular silks which each receipt pretended to cover, and the plan pursued by the receivers was to sell

the silk as a market offered and turn the proceeds over to The Security Warehousing Co., without regard to what receipts they might be pretended to be covered by, or *as to whether the particular silk sold was pretended to be covered by any of the receipts.* The net result was that *all* of the $150,000 worth of silk was sold by the receivers or the other agents and the proceeds paid to The Security Warehousing Co., and in turn paid by that company to the other defendants to cancel the receipts held by them respectively and the balance retained by it on account of its own loans to Dresser & Co., and to cover certain improper payments which it had made (Record, pp. 5, 7).

The same course was pursued with respect to the $20,000 of outstanding accounts which the receivers collected and paid over to The Security Warehousing Co.

All of this was done by the receivers without any reference to the court, without advising the other creditors (Record, p. 5), *and presumably by the advice and procurement of Receiver Mackenzie in the interest of The Security Warehousing Co. of which he was the general counsel, and to relieve that company from its liability on the pretended warehouse receipts which it had issued.*

The receivers remained in possession of the estate for some eight months, during which time all of the silk was sold and the accounts collected and their proceeds paid over (Record, p. 6.)

Shortly after the complainant was elected as trustee he received from The Security Warehousing Co. $1,944.93, which was stated to be the surplus remaining from the sale of the silk after paying the loans of itself and the other defendants made on the pretended receipts and after the disbursements made by it had been paid (Record, p. 6).

The silk sold for less then $125,000. It cost Dresser & Co. *in Japan* upwards of $150,000, and its wholesale market value in New York was more than 20% greater than this purchase price (Record, p. 7).

The books and papers of The Security Warehousing Co. containing all of the information concerning the sale and disposition of the proceeds of the silk and the accounts receivable *have all been lost or destroyed* by that company (Record, p. 6).

Upon these facts the bill prays for a decree directing the defendants to pay over to the complainant the moneys received by them as above stated on the ground that the silks and accounts receivable belonged to the estate of Dresser & Co., and that the pretended warehouse receipts be declared null and void as against the creditors of Dresser & Co. and their trustee in bankruptcy. The prayer also asks for certain other incidental equitable relief applicable to the facts as pleaded (Record, p. 8).

To this bill all of the defendants except the United States Mortgage and Trust Co. demurred on the ground that the District Court of the United States did not have jurisdiction of the matters set forth therein.

The complainant claimed that the court had jurisdiction on two grounds:

1st. That the silk and outstanding accounts having been in the possession of Dresser & Co., at the time when the receivers took possession passed into the custody of the court through its agents, the receivers. That they have never left that custody by reason of any act or thing binding upon the court, that they are still *in custodia legis*

and that everything which may have been done with or in respect to the silk and the accounts by the receivers and the defendants has been done wrongfully and that in respect thereto they are subject to the jurisdiction of the court.

2d. That even though the silk and accounts did not come into the possession of the court free and clear of the claims of the defendants, nevertheless those claims were based upon void transfers, or attempted transfers, made by the bankrupt prior to the bankruptcy, as to which the amendment to § 70e of the Bankruptcy Act expressly gives jurisdiction to the district court.

The district judge held that the demurrer should be sustained on the ground that § 70e, as amended, only gave the district court jurisdiction over controversies respecting transfers made by the bankrupt *prior* to the bankruptcy, while the present suit was to recover property *transferred* by the receivers *after* the bankruptcy. He then argues that jurisdiction could, therefore, only exist in the court on the theory that the silk and accounts were at some time *in custodia legis*.

He then negatives this contention on the ground that the silk and accounts came into the possession of the receivers, if they ever came there, subject to the claims of the defendants, based upon their previous transactions with Dresser & Co., and he holds that this fact prevented their passing into the custody of the court, so as to give it. from that fact alone, jurisdiction over their distribution.

In this line of reasoning the judge apparently overlooked the obvious inconsistency into which it led him, since if the court did not have custody by reason of the colorable transfers made by

Dresser & Co., prior to the bankruptcy, which transfers are void as to the creditors of Dresser & Co., then a case is presented which the amendment to 70e was expressly intended to cover.

Assuming that 70e, as amended, gives the court jurisdiction of suits by a trustee in all cases where a creditor of a bankrupt might have sued to set aside transfers, made by the latter of his property, then the facts disclosed by the bill necessarily clothe the court with jurisdiction since the accounts and silk either went into the possession and custody of the court through its receivers immediately on their appointment, in which case for that reason alone the court had jurisdiction of this suit; or, if there *was no possession and custody* on the part of the court, then it was by reason of *a transfer by the bankrupt void as against his creditors* (Lien Law, *supra*) as to which the amended Section (70e) *expressly* gives jurisdiction.

The dilemma into which the learned judge has fallen is very apparent:

Either the property was in the possession of the court through its receivers, in which case there is jurisdiction for that reason.

Or else it was transferred by the bankrupts prior to the bankruptcy, in which case 70e, as amended, expressly gives jurisdiction.

This dilemma probably arose from an oversight as to the logical result of the argument to show that the court never had custody of the subject matter of the suit.

But two points of law will be submitted on this appeal, and only briefly touched upon:

1st. That the court had jurisdiction because it had custody of the silk and accounts.

2nd. That Section 70e, as amended, expressly confers jurisdiction in a suit to set aside just such transfers as are disclosed by the bill.

Specification of Errors relied upon by the Appellant.

The errors relied upon by the appellant are as follows:

1st. That the District Court of the United States for the Southern District of New York erred in sustaining the demurrer of the defendants and dismissing the complainant's bill on the ground that it had no jurisdiction of the matters therein set forth.

2d. That the District Court of the United States for the Southern District of New York erred in not overruling the demurrer of the defendants and holding that it had jurisdiction over the matters set forth in the complainant's bill.

POINTS.

I.

The District Court of the United States for the Southern District of New York has jurisdiction over this suit, because the subject-matter thereof is in its custody.

It is the contention of the appellant that this suit falls within the class of cases represented by White vs. Schloerb (178 U S., 542), and not within the class represented by Bardes vs. Bank (178 U. S., 524).

When the receivers went into possession of the store and property of Dresser & Co., the silks and accounts in question were in the possession of the bankrupts, and passed from that possession into the receivers' possession. This is specifically alleged in the bill (Paragraphs 18 and 22, Record, pp. 5, 6), and it is previously alleged therein that they always had been in the possession of the firm of Dresser & Co., and never were in the possession of any one else (Paragraphs 8, 9 and 16, Record, pp. 3, 4), besides which the whole bill discloses a course of dealing with respect to the silks and accounts which negatives any possession in the appellees or any one else, other than Dresser & Co., and the receivers. There was no intermediate period between the possession of Dresser & Co. and that of the receivers during which the appellees or any person on their behalf had possession. The statement contained in the opinion of the learned district judge to the effect that "The

receivers found some one else in the bankrupts' store, claiming adversely, and apparently acquiesced in the claim" (Record, p. 16) is unsupported by any allegation in the bill and must have been taken from some statement contained in the briefs of the appellees or made by their counsel upon the argument.

The rule laid down by this court in Bardes vs. Bank that a suit against an adverse claimant under 23b of the Bankrupt Act must be brought in the court where the bankrupt might have sued, only applies to an adverse claimant who has obtained possession of the property in dispute prior to the filing of the petition (Muller vs. Nugent, 184 U. S., 1, pp. 15, 16), and it does not apply to a suit such as this or White vs. Schloerb, where the property in dispute went into the possession of the court, and thereafter was taken away by a third party under a process issued out of another court as in the Schloerb case, or by collusion with the receivers, as in the present case. In such a case the rules applicable to the administration of property in the custody of courts of equity apply.

Where a court of equity has taken possession of property for any reason, and has placed it in the custody of receivers, sequestrators or custodians, it will maintain its possession of such property and will determine all rights with respect thereto, even though the actual physical custody of the property may have been parted with by its officers, either under void orders of the court (Minnesota Co. vs. St. Paul Co., 2 Wallace, 609, pp. 632-33-34) or where the property has been obtained from the receiver or other court officer, through collusion with him (as in this case) or by fraud (De Winton vs. The Mayor of Brecon, 28 Beavan, 200, p. 203).

Where property is in the possession of a court of the United States, as in the present case, its jurisdiction to determine all claims with respect thereto is not dependent upon citizenship of the parties, but upon the fact that the court has taken the property into its custody (Morgan's Co. vs. Texas Central Ry. Co., 137 U. S., 171, p. 201).

Even though the property comes into the possession of a receiver by mistake, he must still hold it, as it is in the custody of the court and the rights of all parties with respect thereto must be determined by that court (Smith vs. Express Co., 135 Ill., 279, p, 292).

A receiver has no right to accept the mere word of a third party claiming property in his possession, and if he does so and upon representations made by such person, delivers the property to him without an order of the court, his action is not binding upon the court, and does not change the legal possession and custody of the property or the right of the court to determine all claims in respect thereto (Sharpe vs. Doyle, 102 U. S., 686, p. 690).

The determination of the rights of all parties to property in the custody of the court where that property has been parted with by an officer of the court, is properly by means of a bill in equity, which, though a separate and distinct suit, is in effect ancillary and supplemental to the original suit or proceeding in which the property was originally taken into the custody of the court (Minnesota Co. vs. St. Paul Co., 2 Wallace, 603, pp. 633-4).

If a district court of the United States has not, under the circumstances set forth in the bill of

complaint, jurisdiction to determine the rights of all parties with respect to the silks and accounts therein described, then we have presented to us the following remarkable situation:

Upon the filing of an involuntary petition in bankruptcy, and on application being made by the petitioning creditors, receivers are appointed. They take possession of the property of the bankrupt. A great portion, and, in fact, practically all of this property consists of a valuable lot of silk goods and a number of accounts receivable. Thereafter a third party appears and states that the bankrupts' store belongs to it, under an alleged lease. This third party then claims that *all* of the silk goods (valued at upwards of one hundred and fifty thousand dollars) have been stored with it in the bankrupts' store, which it terms its warehouse. *One of the receivers is the counsel and attorney for this third party, and one of the bankrupts a stockholder and director.*

Without any reference to the court, without notice to the creditors, and without a question, this claim is secretly acquiesced in.

Thereafter, the third party states that it has issued warehouse receipts against the silks, and that they have been delivered to other persons. It also states that the warehouse receipts so issued call for more silks than are found in the bankrupts' store and it demands from the receivers payment for the deficiency. Again the receivers, without notice to the court or to the creditors, secretly acquiesce in this demand, and to obtain the money they collect, as receivers and as officers of the court, over $20,000 of outstanding accounts belonging to the bankrupts, and pay over the pro-

ceeds to the third party in satisfaction of this claim.

The receivers remain in possession for some eight months, during which time all of the silk goods are sold, the accounts collected and the proceeds paid over under a secret arrangement to the third party.

A trustee is then elected. Upon discovering what has taken place, he appeals to the court to determine whether or not what the receivers had done was proper, and whether or not the creditors of the bankrupts are not entitled to the silk goods and to the accounts so secretly delivered and paid over. To his prayer the court replies in effect:

> "It is true that this court did take into its "custody property of great value found in the "possession of the bankrupts at the time of the "filing of the petition, and collected many of "the outstanding accounts of the bankrupts, "but for some reason or other, its officers, "without reference to it, and without notice "to anyone, saw fit to deliver the property "and the proceeds of the accounts to a third "person. This court is, therefore, powerless. "You may have made out a strong "case upon the face of the bill. All "of the facts which you allege may "be true, and for the purpose of deter- "mining the court's jurisdiction on demurrer, "they must be considered as true. But you "must go to some other tribunal to enforce "your rights. This court is powerless."

The situation so disclosed is absurd. It is submitted that there can be no question but that the district bourt has entire jurisdiction by plenary

suit to determine the rights of all parties with respect to the silk and accounts. *They are still in its custody.* What the receivers did has not altered the situation in the least. They parted with the property entrusted to them as the representatives of the court, without right and without authority, and nothing which they have done is binding upon the court or upon the parties in interest.

II.

Section 70e of the Bankrupt Act, as amended, expressly confers jurisdiction upon the District Court of a suit to set aside transfers made prior to the filing of a petition.

Section 70e, as amended, gives to the trustee the right to avoid any transfer of his property made by a bankrupt which any creditor might have avoided, unless the property is in the hands of a *bona fide* holder for value, and any court of bankruptcy is given jurisdiction over an action brought by the trustee for this purpose.

Assuming that the silks and the accounts never were *in custodia legis*, then, as has been pointed out in the statement with which this brief is prefaced, they must be considered as having been transferred prior to the bankruptcy. This was the view which the learned district judge took, but he failed to appreciate that the result of his reasoning brought the transaction under 70e, as amended.

The appellees are not *bona fide* holders of the silks and accounts. They certainly were not *bona fide* holders of the accounts, since the bill discloses the fact that the accounts collected had nothing to do with the silk pledged. The payment of the proceeds of these accounts to the appellees was therefore a pure gratuity on the part of the receivers.

As to the silks, the possession remained in the bankrupts, and there was no change of custody or control in any way. All that the appellees received were certain papers in the form of warehouse receipts. These receipts did not vest any title in the appellees, unless there had been a change of possession of the silks themselves from Dresser & Co. to that of The Security Warehousing Company.

Even though there had been a change of possession if there was any vice or defect in the warehouse receipts, the appellees were not *bona fide* holders for value, with respect thereto, so as to cut out any adverse claim to the silks (Shaw vs. R. R. Co., 101 U. S., 557; Pollard vs. Vinton, 105 U. S., 7).

It is true that the appellees who hold these warehouse receipts can enforce them against the Security Warehousing Company, (if they did not know of the fictitious bailment), but this is by reason of an estoppel which exists in their favor because of the representations therein contained, namely, that The Security Warehousing Company, had goods of the value and sort set forth in the receipts which it promised to deliver to the holder thereof upon the terms therein stated (Friedlander vs. Texas and Pacific Ry. Co., 130 U. S., 416, p. 424; The Carlos F. Roses, 177 U. S., 655, p. 665).

The bill discloses, however, that the silks were never stored with The Security Warehousing Company, and under the decisions of the courts of the State of New York, such a transaction is voidable by the creditors of the owner of the goods, because it is an attempt to create a chattel mortgage without change of possession and without filing as required by statute (Yenni vs. McNamee, 45 N. Y., 614; Button vs. Rathbone, 126 N. Y., 187).

It may be that the appellees are *bona fide* holders of a piece of paper purporting on its face to be a warehouse receipt for a certain amount of silk, and that The Security Warehousing Company is estopped from denying that such is the case, and is bound to make the receipt good; but as to the creditors of Dresser & Co. and as to the silks involved in this suit, the appellees are not *bona fide* holders.

Standing by itself, Section 70e, as amended would leave no doubt as to the jurisdiction of the court. The language of the amendment is clear and simple. If it does not give jurisdiction, then it means nothing at all, and in the construction of a statute such a lack of meaning will not be presumed.

On the argument below, the appellees laid great stress upon the fact that the amendment to Section 23b, as originally passed by the House of Representatives, included a reference to Section 70e, as well as to Sections 60b and 67e.

In the Senate the amendment to 23b was altered by striking out any reference to 70e. So that, taken by itself, Section 23b only permits a suit by a trustee to be brought or prosecuted in the courts where the bankrupt might have brought or prose-

cuted it, unless the proposed defendant consents, except suits for the recovery of property under Sections 60b and 67e.

The argument of the appellees was that, as the defendants had not consented to the bringing of this suit. 70e, as amended, although it specifically gives jurisdiction, must still be considered as limited by the general provisions of 23b.

The opinion of the learned district judge assumes that suits by a trustee in bankruptcy, without the consent of the defendant, may be brought in the district court under Sections 60b, 67e and 70e, and does not refer to the argument of the appellees upon this point.

The case of Gregory vs. Atkinson (127 Fed., 183), was much cited and referred to by the appellees in support of their argument that 70e does not give jurisdiction where the defendants do not consent. The opinion of the learned judge deciding that case seems to set forth all that can be said in favor of such a contention. There are several decisions in the district courts and in the circuit courts of appeal which hold that 70e does give jurisdiction without the consent of the defendants (Horskins vs. Sanderson, 132 Fed., 415, p. 416; *In re* Leeds Woolen Mills, 129 Fed., 922, p. 926; Pond vs. N. Y. Nat. Exchange Bank, 124 Fed., 992; Lawrence vs. Lowrie, 133 Fed., 995; Delta National Bank vs. Easterbrook, 133 Fed., 521).

The question has not, as yet, been passed upon by this court.

It is submitted that the well known rule that, in construing a statute, a meaning must be given to each and every part thereof, requires that the plain intent as expressed in the amendment to

70e, that suits of the character therein enumerated may be brought in the district court, requires a construction which will confer such jurisdiction, and not a construction such as is contended for by the appellees, which will render its language meaningless. It was suggested below that 70e, as amended, simply intended to confer upon the district court jurisdiction over the subject matter, and not over the person. This contention is not tenable, since the district court prior to the amendment had jurisdiction over the subject matter, but not over the person, except by consent.

23b is a general provision, and 70e is a special one. Where there is any conflict between a general and a special provision, the universal rule of construction requires that the special provision shall be considered as an exception to the general rule, contained in the general provision (Townsend vs. Little, 109 U S., 504, p. 512; U. S. vs. Nix, 189 U. S., 199, p. 205).

The proceedings in the Senate at the time of the passage of the amended act afford no clue to the reason for striking out the reference to 70e in 23b, and the committee which struck out this reference rendered no report; but it is safe to assume that 70e, as amended, was intended to mean something and that if the reference thereto in 23b was struck out for any reason, it was because the suits there referred to are such as might have been brought or prosecuted by the bankrupt, while the suits referred to in 70e are only such as might have been brought by a creditor of the bankrupt.

Whatever may have been the intention of Congress—and there is no means of ascertaining what that intention was—it certainly will not be pre-

sumed that it intended to amend 70e for nothing. The intention of the amendment to 70e certainly was to confer jurisdiction upon the district courts over suits brought thereunder, and to escape from the limitations laid down in Bardes vs. Bank. There can be no other possible meaning to the words of the amendment, and the courts will not disregard that clear meaning on the theory that the amendment was *perhaps* inadvertently passed.

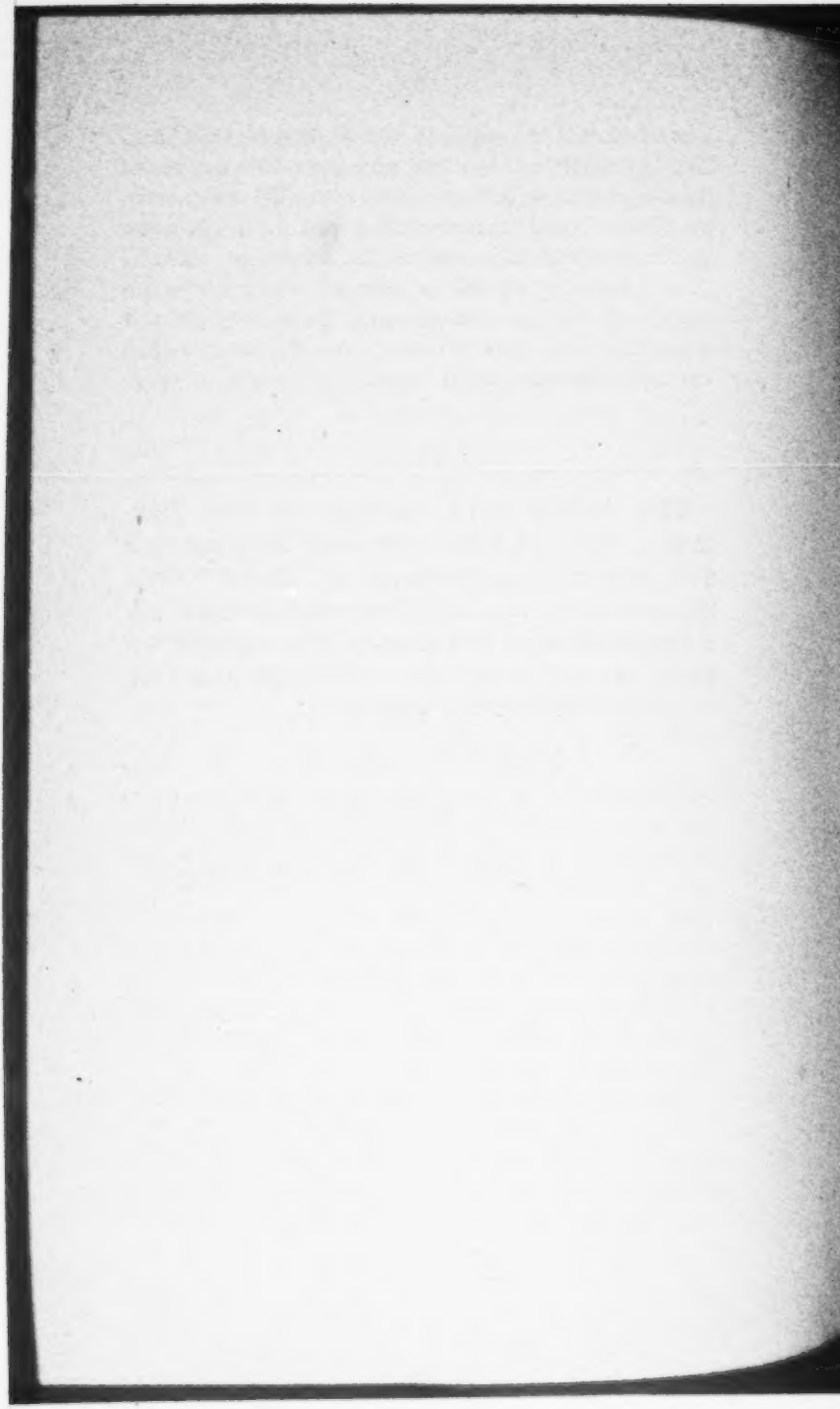
II.

The order and decree of the District Court of the United States for the Southern District of New York dismissing the bill herein should be reversed and the cause remanded to that court with instructions that it take jurisdiction thereof.

Respectfully submitted,

ROBERT D. MURRAY,
GEORGE H. GILMAN,
Counsel for Complainant-Appellant.

[6747]



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United States Supreme Court

October Term, 1904.

No. 913.

IN EQUITY.

EDWARD R. WHITNEY, as Trustee in Bankruptcy of DANIEL LE BOY DRESSER and CHARLES E. HESS, as members of the firm of DRESSER & COMPANY,

Complainant,

against

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, THE SECURITY WAREHOUSING COMPANY and UNITED STATES MORTGAGE AND TRUST COMPANY,

Appellees.

REPLY BRIEF OF APPELLANT.

ROBERT D. MURRAY,
J. ARTHWALL HOPKIN,
GEORGE H. GILMAN,
Of Counsel for Appellant.

APPEAL PRINTING CO., 15-19 NEDY ST., N. Y. CITY

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 576.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as members of the firm of Dresser & Company,
Appellant,

against

CHARLES H. WENMAN, Stuyvesant Fish, George C. Boldt, The Security Warehousing Company and United States Mortgage and Trust Company,
Appellees.

In Equity.

Reply Brief of Appellant.

Appellees demurred for lack of jurisdiction alone. They argued no other question below. No other question is certified to this Court. Now they try to bolster their case by attacking the merits

of the cause of action pleaded, as if they had demurred generally.

This they cannot do. The certificate raises only the question of "jurisdiction of Courts of the United States *as such*" (Schweer v. Brown, 195 U. S., 171; Lucius v. Cawthorn-Coleman Co., 190 U. S., 149). The merits of the case are not before this Court,* and "the question of jurisdiction alone" can be considered (Act of March 3, 1891, c. 517, §5 (Hennessy vs. Richardson Drug Co., 189 U. S., 25, 33; Huntington v. Laidley, 176 U. S., 668, 679; McDonald v. Smalley, 1 Pet., 620).

We, therefore, confine our discussion to "the question of jurisdiction alone."

On page 20 of The Security Warehousing Company's brief, the case of New York Economical Printing Company (110 Fed., 514) is cited as an authority for the assertion that there should have been an allegation in the bill that there was a judgment creditor in existence, in whose right the trustee was acting.

As to this the subsequent decision of the same Court, U. S. Court of Appeals, 2nd Circuit (*In re* Garcewich, 115 Fed. Rep., 87), to the effect that a fraudulent arrangement whereby the bankrupt was

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* Compare bill of complaint, par. 16 (Record, p. 4), with *In re* Garcewich, 115 Fed. Rep., 87, 89-90, and cas. cit.; Hangen v. Hachemeister, 114 N. Y., 566; Southard v. Benner, 72 N. Y., 424; Russell v. Winne, 37 N. Y., 591. Appellees confuse the New York Lien Law as to chattel mortgages with the Personal Property Law as to pledges and other charges.

enabled to sell and dispose of the property in question as his own, brought the transaction within the positive provisions of the Bankrupt Act, and distinguished it from the Economical Printing Company case, would seem to set at rest any question as to the necessity of the existence of a judgment creditor.

Again, the appellant is of the opinion that the Economical Printing Company case will not be upheld by this Court.

The Lien Law of New York provides that transactions such as are disclosed by the appellant's bill, shall be "absolutely void as against creditors" (p. 4, appellant's original brief, note).

This Court, in Muller vs. Nugent (188 U. S., 1, p. 14), has held that the filing of a petition in bankruptcy is in effect a levy of attachment and it is settled law of the State of New York that an attaching creditor may attack an invalid chattel mortgage, *i. e.*, the transaction disclosed by the appellant's bill (*In re* Economical Printing Company, 110 Fed., 514, p. 517, and cases therein cited).

The other Circuit Courts of Appeals have refused to follow the Economical Printing Company case (Chesapeake Co. vs. Seldner, 112 Fed., 593; *Re* Antigo Screen Co., 123 Fed., 249; *Re* Rodgers, 125 Fed. 169; *Re* Pekin Plow Co., 112 Fed., 308; Spencer vs. Duplex Co., 112 Fed., 638-643), and even in the Second Circuit there is grave doubt as to whether that case is to be longer considered as authoritative (*In re* Beede, 126 Fed., 853).

See also Mueller vs. Bruss, 112 Wisconsin, 406, at p. 412, and cases there cited.

This Court in Hewit vs. Berlin (194 U. S., 302-3) held in construing the statute of New York with

respect to conditional sales, that a trustee in bankruptcy has no standing to attack a voidable transaction thereunder. That decision was under Section 112 of the Lien Law, which reads as follows:

> "Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by immediate delivery and continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency shall be void as against subsequent purchasers, pledgees, or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article."

This section is entirely different from Section 90 of the Lien Law quoted at the foot of page 4 of our original brief, which makes alleged chattel mortgages *void as to creditors.*

In addition to all this, the transaction as disclosed by the bill was a fraud upon the creditors, and the property could have been levied upon by creditors of the bankrupts and sold under judicial process against them as provided by 70a of the act.

It is intimated (p. 32 Security Warehousing Company's brief, and p. 9 of Wenman's brief) that the appellant's bill connot be sustained because he has a remedy by a summary proceeding in the bankruptcy proceeding itself.

This contention of the appellees is somewhat unique.

It is not an infrequent complaint of claimants in bankruptcy proceedings that they have been summarily dragged into a proceeding in which they have no interest and compelled to submit to a determination of their property rights; but this is the first instance in which we have known of the complaint being made that such drastic measures were not instituted.

It would seem unnecessary to devote any attention to this suggestion since, if the Court is without jurisdiction to determine the title to property by a plenary suit in which the parties all have their day in Court with an opportunity to be fully heard, it certainly has not jurisdiction to dispose of the same question of title in a summary and informal manner. The right to proceed summarily certainly carries with it as a necessary consequent, the right to sue by separate though ancillary suit in the same Court, as was done in Minnesota Co. vs. St. Paul Co. (pp. 14-15, appellant's original brief). That case would seem to set at rest any question as to appellant's right to maintain this suit under the general power of a court of equity to reclaim by summary process *or otherwise* property improperly taken from its custody. The ingenious distinction between the Minnesota Co. case and the case at bar drawn by the learned counsel for The Security Warehousing Company (p. 30 of his brief) on the ground that the former is a railroad case, and by the learned counsel for Wenman, *et als.* (pp. 11-12 of his brief) on the ground that it was not a bankruptcy case, needs no comment.

Bardes vs. Bank only held that a plenary suit would not lie to reclaim assets transferred by a

bankrupt prior to his bankruptcy. It did not hold that such a suit could not be entertained where summary proceedings could have been brought.

The trustee could have proceeded by petition against the appellees as was done in the Schloerb case (178 U. S., 542). Instead he chose to proceed by bill in equity as ancillary to the main bankruptcy proceeding, which is itself, in effect, a creditors' bill.

On page 14 of the brief of Wenman, a reference is made to the suit originally brought by appellant in the Supreme Court of New York.

Under a peculiar provision of the New York Code of Civil Procedure, a motion was made to compel the plaintiff to separately number and state the causes of action against the various defendants. This decision was by the Appellate Division of the Supreme Court, and a compliance therewith would have necessitated the bringing of from four to five separate jury actions in conversion, which, in view of the commingling of the silks by the receivers and defendants, would have been impracticable if not impossible. Appeal to the Court of Appeals could not be taken.

Recourse was therefore had to a bill in equity in the District Court, since the New York Code, as interpreted by the inferior court in question, left the appellant practically without a remedy in the Courts of that State.

April 29th, 1905.

ROBERT D. MURRAY,
J. ASPINWALL HODGE,
GEORGE H. GILMAN,
Of Counsel for Appellant.

FILE COPY.

FILED
APR 22 1905
JAMES H. MCKENNEY,
Clerk.

United States Supreme Court.

OCTOBER TERM, 1904.

No. 575.

EDWARD B. WHITNEY, as Trustee in bankruptcy, etc.,
Appellant,
against
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, THE SECURITY WAREHOUSING CO., and U. S. MORTGAGE & TRUST CO.,
Appellees.

IN EQUITY.

THE SECURITY WAREHOUSING COMPANY'S BRIEF.

SMITH & BARKER,
56 PINE STREET,
Manhattan,
New York City,
Attorneys for said Appellees.

EDWIN B. SMITH,
Of Counsel.

C. G. Roebuck, Walker and Cedar Streets, N. Y.

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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 576.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as members of the firm of Dresser & Co.,

Appellant,

AGAINST

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, SECURITY WAREHOUSING COMPANY and UNITED STATES MORTGAGE AND TRUST COMPANY,

Appellees.

In Equity.

BRIEF FOR THE SECURITY WAREHOUSING COMPANY, APPELLEE.

Statement.

The appellant's bill in equity indicates the actual fact, that no defendant thereto has received from Dresser & Co.'s estate a single dollar beyond the amount loaned that firm (more than six months prior to its bankruptcy) in good faith, as a current business

transaction; the security therefor, which the bill seeks to invalidate, being taken contemporaneously with the making of the loans, as the vital part of that transaction. (Rec. 3, top; ¶ 6.)

Thus sections 67*b* and 60*e* of the bankrupt act are eliminated from discussion.

Nor has section 90 of the New York law, quoted at the bottom of pages 4 and 5 of appellant's brief, any application; because our lease was filed as the law directed, and the bill does not claim it was not.

Prior to its issue of warehouse-receipts (Rec. 4, ¶ 10) the Security Warehousing Company took a lease of the premises in which were the goods pledged (*Id.* 3, ¶7.) There is no averment that this lease was not duly and properly recorded: no such statement could be made truthfully. It was so recorded; as is naturally inferable from the failure to state the contrary, or to make the lease an exhibit, as well as from the avowal that its purpose was to make those premises one of this defendant's storage-warehouses. (Ibid.) Its record must have been known to the mercantile agencies, and published in the law (and other) journals, according to the usual course of affairs. The warehouse-receipts themselves, intended to be negotiated for loans, as they actually were (*Id.* 4, ¶12.) refute all suggestions of "secret arrangement" (¶10) "concealment from unsecured creditors" (p. 3, ¶6), etc., argumentatively made as mere conclusions of the pleader and not as facts. Putting "the *nominal* rental" at a dollar a year was conformable to a usage so common as to be judicially noticed; the real consideration moving this defendant to take the lease obviously appearing elsewhere therein, and not stated by the complainant. Under its lease, this defendant did employ a custodian (12 Pick. 76; 96 U. S. 467) and did tag the goods (P. 3, ¶9). Whether tags are 'few' or numerous; or are 'small' or large, etc., are mere conclusions, in the absence of facts showing their number, size and position; and the same is true as to the statement (P. 4, ¶11) as to the character of the

receipts, the tenor of which is not given, nor one attached as an exhibit.

Manifestly, from the stated circumstance (P. 4, pars. 12 and 13) that this defendant itself held some of these receipts to secure loans to Dresser and Company (and, of course, was responsible to the other holders for the safekeeping of the pledged goods), there could be no design to omit such action as it considered necessary for the purpose of their retention as security. Whether this defendant acted wisely or not, it certainly acted *bona fide*. In the copious use of adjectives and imputations in the complaint the word "fraudulent" is not employed; nor any statement of facts which imply fraud, and are equivalent to the use of that term.

There is nothing in the bill which tends to impugn the strictest good faith on the part of any defendant other than the one we represent throughout the proceedings, from the time they made their loans to Dresser & Co. on the security of these receipts until they got their money back upon the surrender of those receipts to this defendant.

In order to protect these other receipt-holders as well as itself, the Security Warehousing Co., after Dresser & Co. were adjudicated, continued to retain possession of the pledged goods, the receivers in bankruptcy acquiescing in its just claim of right to do so; and to sell them to redeem the warehouse receipts; *and its other charges* (Rec. 5, 6; pars. 18 to 24 inclusive). Without so stating the pleader seems to assume argumentatively (Rec. 5, 6; pars. 21 to 24 and 29) that this defendant had no pledge of, or lien upon, these silks except to the extent it had issued negotiable warehouse receipts thereon. Such is not the case. From the moment goods are warehoused, there is a lien upon them for storage, advances, expenses and charges upon *all* the same owner's goods (N. Y. lien law, § 73; 121 N. Y. 393) to the extent of the claim and right given by the contract under which they are stored, whether warehouse receipts are ever issued against

them or not. What the contract between us and Dresser & Co. was, the bill does not show. Had the lease been made an exhibit, it would have appeared that, in everything which was done, we were acting strictly within our rights under our contract. (95 U. S. 764.) In its absence, it cannot be assumed that we were not doing so.

Van Heusen v. Radcliffe, 17 N. Y. 580.

The foregoing recitals, and comments upon the allegations of the bill, are made chiefly with reference to our proposition of law hereinafter discussed (*post*, p. 21) that, under section 70*e* of the bankrupt act, neither the United States District Court *nor any other tribunal* has jurisdiction to entertain a suit by a trustee in bankruptcy to recover property from a *bona fide* holder for value. To make out a case, the trustee must state *facts* showing a want of good faith, or the absence of a valuable consideration.

The purpose of the present bill controvenes the purpose of the exception found in section 70*e*. For the benefit of those dealing, for mercantile profit, with Dresser & Co. upon the general credit of that firm, the bill proposes to deprive the makers of cash loans, effected to aid the firm in carrying on its business and paying its debts and expenses (Rec. 3, par. 6) of the security taken for such loans. Sec. 70*e* gives no authority to the trustee to bring such a suit anywhere.

Statute.

The pertinent provision of section 70*e* of the bankrupt act reads:

"SECT. 70*e*. The trustee may avoid any transfer *by the bankrupt* of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, *unless* he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered, or its value collected, from whoever may have received it, EXCEPT *a bona fide*

holder for value. For the purpose of *such* recovery [*i. e.*, from one *not* "a *bona fide* holder for value"] any court of bankruptcy, and any state court which would have had jurisdiction, if bankruptcy had not intervened, shall have concurrent jurisdiction."

The last clause, conferring concurrent jurisdiction, was added by the amendatory law of Feb. 5, 1903.

LAW.

I

The issue.

The subject of investigation and determination by this court is that presented (in somewhat different phraseology) by the third question in the Bardes case (178 U. S. 526 top) whether the district court had power to "take jurisdiction over the suit *as it now stands upon the record?*"

This appeal (Rec. 18, fol. 33) is from the final decree entered Feb. 21, 1905, dismissing the bill "on the ground that this court has not jurisdiction to entertain this suit." (*Id.* 17, fol. 30.) This was the ground of demurrer. (*Id.* 14, fol. 25.)

The fifth section of the act of 1891, chap. 517, prescribes that "the question of jurisdiction *alone* shall be certified to the Supreme Court from the court below for decision." (26 Stats. 827 bottom.)

In his certificate, filed a week after the entry of final judgment, the judge states his dismissal of the bill to have been grounded upon lack of the defendants' consent. (Rec. 17, 18.) This, however, does not circumscribe the duty of this court, nor restrict us to that ground for sustaining the decree. The inquiry here is not whether the reason assigned by the judge is sound,

but whether the court's decree is justified by the record. The views of the judge stated in the certificate are no more controlling here than those expressed in the opinion.

Naturally, we believe he gives a valid reason for a correct conclusion; yet we also believe there were others, too, imperatively demanding the dismissal of the bill, even had the controversy been between citizens of different states; and we ask the court to scrutinize the entire record. *Ex gr.* if Mr. Whitney's appointment as trustee had not been stated, it would have been as fatal to the bill, under our demurrer, as the lack of defendant's consent; and so of every fact essential to jurisdiction. Every averment of any such fact is of equal importance.

II.

Jurisdiction, Generally.

As to courts of limited jurisdiction, "the fair presumption is that a cause is without its jurisdiction till the contrary appears." (4 Dallas, 12.)

"Such jurisdiction, or the facts upon which in legal intendment it rests, must be distinctly and positively averred in the pleadings, or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively."

Thomas v. Board, 195 U. S., 210 mid.
Peo. v. Spencer, 55 N. Y. 1, bottom.

As MORROW, C. J., says:—

"We are confronted at once with the presumption that the cause is without the jurisdiction, unless the contrary affirmatively appears," citing cases to show that "the court would infer or presume against jurisdiction, but not in its favor."

Fife v. Whittell, 102 Fed. R., 539, 540.

It becomes necessary, then, carefully to consider the statutory provisions of the Bankrupt Act of 1898 (as amended February 5, 1903) and to compare with them those statements of facts in the bill of complaint which a demurrer admits, to see if these make out a case so "specially circumstanced" (4 Dall., 11) as to bring it within the jurisdiction of the district court.

III.

Statutory Provisions.

Before taking up any section of the law, the course of the appellant's argument, and his citations lead us to premise that the inquiry does not relate to an exercise of the authority of the Court over an estate being administered in bankruptcy, but relates to the conditions which allow it jurisdiction over a plenary bill in equity. Sect. 23*a* makes this distinction. *In re* Gray, 47 App. Div., 557; 178 U. S. 532-3; and cases *passim*.

Section 23*b* allows the trustee to sue only in that forum in which the bankrupt (had he not been petitioned into bankruptcy) could have sued "unless by consent of the *proposed* defendant," except suits for the recovery of property under section 60 subdivision *b*, and section 67, subdivision *e*"; which exceptions do not affect the present case.

It does not except suits brought under sec. 70*e*. *Exceptio unius, etc.*

Of the many changes made in the Act of 1898 by that of 1903 we need only consider section 23, in connection with the exception added thereto and the concluding clause added to § 70*e*.

Subdivision *a* of section 23 gives circuit courts only such jurisdiction of an equity cause, "as distinguished

from proceedings in bankruptcy," as they might have had if no such proceedings had been instituted.

Subdivision *b* originally restricted suits by a trustee in the same way "unless by consent of the proposed defendant." This did not by name confer authority upon the district court to hear a case in equity; but it is held to be included in the word 'courts.' (178 U. S. 536.)

The only change made in this section by the act of 1903 is the addition "except suits for the recovery of property under § 60*b* and § 67*e*." (32 Stats., Pt. 1, pp. 798-9.)

The complainant sets forth no cause of action under sections 60*b*, or 67*e*, and his counsel disclaimed to the court any such purpose; hence, this exception does not affect the present case.

Thus section 23, with the exception eliminated, and section 70*e* are the only provisions of the act which give *any* right to bring a bill in equity.

As shown by the Congressional Record, the changes were made thus:

As introduced, and passed, in the House the Ray bill (H. R. 13679) did have the words 'and 70*e*' to conclude this exception added to § 23*b*. The House bill was referred to the Judiciary Committee, Jan. 5th, 1903. (36 Cong. Rec. 484.) A week from that day the bill and the amendments proposed to be made to it were reported back from the committee by Sen. Nelson, whose interest in the subject is well known. (*Id.* 663.) Having been printed with the amendments, it was "read for information" Jan. 20. (*Id.* 990.) Upon the following day, Jan. 21, 1903, it was taken up and each amendment, consecutively numbered, considered; the matter on this day being in the charge of the late Sen. Hoar. (*Id.* 1034)—At p. 1036, Part I, Vol. 36 of the Congressional Record, a little above the middle of the first column, this appears;—

"The next amendment was on page 7, line 23, before the word 'section' to insert 'and', and in the same line after the words 'subdivision *e*' to strike out 'and

section 70 subdivision *e*', so as to make Sec. 8 read; 'That subdivision *b* of section 23 of said act be, and the same is hereby, amended so as to read as follows;—

'*b*. Suits by the trustee shall only be brought *or prosecuted* in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the *proposed* defendant, except suits for the recovery of property under section sixty, subdivision *b*, and section sixty-seven, subdivision *e*.' (36 Cong. Rec. 1036.)

"The amendment was agreed to." *(Ibid.)*

The concluding clause of section 70e was left in the bill (H. R. 13679) as it came from the House and now appears on the statute book. The bill passed the Senate, *nem. con.*, that day. Jan. 26, 1903, the Senate amendments were "laid before the House" by Mr. Jenkins, chairman of the judiciary committee, who declared them "a decided improvement on the House bill." (36 Cong. Rec. 1270.) The bill was debated, conceded to have been improved, and all of the amendments concurred in by a vote of 101 to 22. *(Ibid.* 1370 to 1376.) The vote being to concur *en masse*.

Mr. Jenkins earnestly urged a general concurrence in all amendments, lest a conference should defeat the amendatory act for the final session of that Congress. *(Ib.)* Hence, it was, through haste and inadvertence, the concluding clause of § 70e, unnoticed in the Senate, remained in the statute.

One great obstacle to the continued existence of a bankrupt law has been jealousy of the federal courts, in some parts of the country. It was this feeling that led to the original section 23b; and it induced the striking out of 70e from the proposed amendment of that paragraph.

Though the views of an individual legislator cannot affect the construction of a statute, the general course of the debate, the report and action of the committee, and especially of one branch of the legislature in

amending the bill, are proper subjects of consideration.

C. & P. Co. v. Manning, 186 U. S. 245 citing *Blake v. Nat. Bks.* 23 Wall. 319;
Platt v. Un. Pac. 99 U. S. 64, and
Church v. U. S. 143 *Id.* 464.
Am. Co. v. Worthington, 141 *Id.* 474.
People v. Dalton, 158 N. Y. 184–5.

In Simpson v. Story, 145 Mass. 498, considering *(inter alia)* "the mode in which the embarrassing words were introduced as shown by the journals and records," and referring to the Congressional Record, the court held the word 'vessel' not to include a fishing-vessel; citing 23 Wall. 319, where the same language is used; also 91 U. S. 71, and 102 *Id.* 1.

Mut. Ins. v. Champlin, 21 F. R. 85.

Quoting the maxim *Ex antecedentibus et consequentibus fit optimus interpretatio* as 'one of the most important canons of construction', the Penn. court (per SHARSWOOD, J.) held that the generality of the right of recovery given by § 39 of the bankrupt act of 1867 must be restricted to the causes of action mentioned in § 35 of that act.

Hall v. Deshler, 71 Pa. St. 301.

Under the bankrupt law of 1841, this court (per GRIER, J.) conceding that the contention of the plaintiff in error would be correct if sec. 4 were construed independently of other provisions, held the generality of its language was restricted by that of the second section of the act.

Peck v. Jenness, 7 Howd. 622–3.

The matters covered by amended sections 60*b* and 67*e* relate to preferences and conveyances *intended* to defeat the object of the bankrupt act; and, therefore, preferably to be heard in the bankruptcy courts. Section 70*e* affects fraudulent conveyances running back through the period of the state's statute of limi-

tations, which are a fraud upon creditors, though made without reference to the bankrupt act. These long-past transactions it was considered by the Senate should be left to the state courts, unless the defendant was willing to submit them to the scrutiny of a federal tribunal—and the House acquiesced in this disposition of the matter.

This action on the part of congress led Mr. Hotchkiss, in his (4th) edition of Collier on Bankruptcy, 250, to "doubt whether any suit to recover property transferred more than four months before bankruptcy can be laid other than in the state court"—unless there is diversity of citizenship.'

E. B. ADAMS, D. J., carefully examining the subject, concluded no such action could be maintained in a federal court without defendant's consent.

Gregory v. Atkinson, 127 F. R. 183.
Brandenburg, 369, §578.

Judge HOLT apparently inclined to the same conclusion in sustaining our demurrer according to the superfluous statement in his certificate (Rec. 18 top) though the commencement of his opinion (*Id.* 15, fol. 27, bot.) indicates another ground; *i. e.* that the bill is not aimed at a transfer *by the bankrupt*, to which alone §70*e* relates.

No other reasonable purpose than that of denying or limiting jurisdiction can be assigned for striking out the words 'and section 70*e*' from the bill, leaving sections 60*b* and 67*e* as the only exceptions to the requisite consent prescribed by section 23*b* as the general rule for suits by a trustee in a federal court of the parties' residence.

Construing section 70*e* as giving absolute right to the courts of bankruptcy to entertain suits under sections 60*b* and 67*e*, and no right, or only one conditional upon the proposed defendant's consent or diverse citizenship, to take cognizance of other suits by the trustee, makes all three sections harmonious and the law consistent. No other construction does this.

In any view of section 70*s*, to maintain an equity suit under it by a trustee, these facts must be averred with the certainty and positiveness required in equity pleadings, viz:

(1.) A transfer *by the bankrupt*.

(2.) Such as his creditor might have avoided.

(3.) That the defendant is *not* a *bona fide* holder for value.

(4.) The bill must also aver that the *proposed* defendant has consented to the bringing and *prosecution* of the suit in the federal court.

The right being statutory, "before a party can avail himself of it, he must show *upon the record* that his is a case which comes within the provisions of the Statute". (95 U. S. 185 bot.)

Pac. Ry. v. Los Angeles, 194 *Id.*, 118 mid.

An examination of the bill discloses that it does not positively, nor properly aver any one of the necessary jurisdictional facts.

IV.

Analysis of the bill.

"However presented, the question of jurisdiction depends primarily upon the allegations of the bill" (194 U. S. 118 mid.) and it is immaterial in what form, by demurrer or motion, the failure to state a case is called to the attention of the court. *(Ib.)* Chase v. Palmer, 23 Mo. 345 per WHITMAN, C. J.

We shall refer to the defective statements (and the omissions) of the bill only as related to their insufficiency to show jurisdiction; meeting the criticism of counsel below that some (not all) of our objections merely indicated 'want of equity' with the suggestion

that, in a court of equity (especially one of limited jurisdiction) "want of equity is want of jurisdiction."
Richards v. Lake Sh. 124 Ills. 521.

The presumption against jurisdiction accompanies the search for it throughout the statements of the bill; so does the one rule which Welsford says is always strictly applied, "that the pleading will be construed most strongly against the party pleading" (Wels. Eq. Pl. 10) because, as Farren states it, the complainant cannot be supposed to have any greater right, or the defendant any more guilt, than the pleadings (thus construed) set forth. (Bill in Ch. 1, 2.) The application of this rule is equally well-known, universal and stringent as the rule itself, viz.;—that where the pleading is ambiguous and susceptible of two interpretations, the demurrant may adopt that most favorable to himself and most against the plaintiff's interest. (Wels. 126 mid.; Mitf. 128 note 1.)
Vernon v. Vernon, 2 Myl. & Cr. 145.

"No fact can be assumed in favor of the party pleading, except it be directly averred, or arises by necessary inference. On the contrary, the construction shall be taken most strongly against him, as it is to be intended that every person states his case as favorably to himself as he can." Griswold v. Mather, 5 Conn. 438 bottom, per HOSMER, C. J.
Clark v. Dillon, 97 N. Y. 373, bot.

It will be noticed that every allegation of the bill seeking to affect the defendants is "stated on information and belief." (Rec. 2, top.)

In the "Statement" of his brief (2 mid.) appellant's counsel assumes many things to be "admitted by the demurrers" which we do not thereby admit, because not "well pleaded", being mere conclusions, argumentative, bad for duplicity, and otherwise objectionable, not stating facts.

As was said per DAVIS, J.; "The statements of this bill are vague and uncertain, frequently argumentative,

very rarely plain and direct. The whole bill lacks definiteness. Agreements, friendly arrangements, understandings and devices are freely spoken of, but the character of the agreements and the nature of the devices we do not learn." 2 Black, 587.)

The adjectives and epithets of the bill are not admitted by the demurrer; the Court ignores them. Mere 'charges' of fraud "make not the slightest impression upon the mind of the Court upon the hearing of a demurrer."

Nesbitt v. Berridge, 8 Law T. (N. S.) 77.
Fogg v. Blair, 139 U. S. 127.
Kent v. Lake, 144 *Id.* 91.
Preston v. Smith, 26 F. R. 884 (BREWER, J.)

The first three paragraphs of the bill merely state the parties thereto. (Rec. 2.)

In order to affect the other defendants with the doings of Mr. Wenman, the fourth paragraph commences; "4. In and about *some* OR all of the matters," etc., set forth as done by him, Mr. Wenman "*acted*" as the agent, &c., of Messrs. Fish and Boldt, who were his principals "with respect to *some* OR all of his dealings" with Dresser & Co., "and with respect to *some* OR all of the dealings of Wenman with *any and all* of the defendants in this suit, as in this bill set forth, and *some* OR all of the moneys paid to him were OR should have been paid over," less his compensation, "to his said principals." (Rec. 2, fol. 3, par. 4.)

The probable purpose of these ineffective allegations is to connect the other defendants with the warehouse receipts issued to Dresser & Co., which they 'in turn' negotiated; "*some* to the defendant Wenman for himself OR for the defendants Fish and Boldt," etc. (Rec. 4, fols. 6, 7), and to "others."

In par. 17 of the bill, it is said all the defendants, when they took these warehouse receipts, "knew, OR ought to have known" matters supposed to affect their validity. (Rec. 5 top.)

Such allegations in the alternative state no fact.

"To state in the alternative is to state neither the one nor the other fact." It results in a mutual exclusion.

Cronin v. Crooks, 143 N. Y. 354.
U. S. v. McCreery, 62 U. S. Ap. 337.
Brown v. Keene, 8 Pet. *115.

"It is no answer to an objection to averments made in the alternative to say that, if either averment is true, the plaintiff has alleged a cause of action." Jamison v. King, 50 Cal. 136.
Potter v. Harman, 8 *Id.* 623, FIELD, C. J.

These last allegations do not affect the good faith of the defendants, which is affirmatively established by other statements of the bill.

The fifth and sixth paragraphs state that Dresser & Co., at least as early as Sept. 7, 1902, were 'insolvent' (*i. e.* in the ordinary, not statutory, meaning of that word—*solvere ad diem*) and only able to continue in business by borrowing large sums—not an uncommon mercantile condition (Rec. 3, par. 6). The rest of the sentence "to secure which it became necessary to pledge the goods," etc., concealing "the *fact*" of such pledge from unsecured creditors (*Id.*) is merely an argumentative inference of the pleader; shown to be fallacious by the statement of the next paragraph (7) that a lease was given; not claimed to be unrecorded. (17 N. Y. 580; p. 582.)

The seventh paragraph (Rec. 3, fol. 4) says that "for the purpose of pledging these goods with certain of their creditors" (unnamed) "without the knowledge of their other creditors" Dresser & Co. entered into an arrangement with the Security Warehousing Co. whereby the firm leased to the Warehousing Co. the store on Greene Street in order that it might be one of this defendant's warehouses and all the goods in it were delivered to this defendant for storage therein (Rec. 3, fols. 4, 5).

This paragraph is replete with useless adjectives and imputations which we have ignored, as Judge HOLT did (Rec. 16) and as this Court will.

It commences with "the ascription of a purpose," not admitted by demurrer (21 Wall. 497 bottom). It calls the lease "an *alleged* lease" and in his brief (p. 3 top) plaintiff's counsel says "a *pretended* lease," and the paragraph concludes by designating the store as a "pretended warehouse" (Rec. 5, fol. 5).

"The bill alleges and, of course, by such allegation admits the entry by the City of Alton of a 'pretended decree.' * * * A pretended decree is a decree apparently or *prima facie* valid; and the complainant having admitted the entry of such decree, the burden was clearly upon him to show that such decree was invalid, an unreality, a pretence."

Bowman v. Ash, 148 Ills. 667.

The bill lays stress upon the omission by Dresser & Co. to notify "other creditors" of these loans and pledges; as if it were the customary thing for merchants borrowing from banks or individuals, on or without collateral, to send around to everybody they owe notice of the accommodation obtained!

In law, *the record of the lease was notice to all the world* (See last clause of § 90, in note to pp. 4 and 5 appellant's brief).

Van Heusen v. Radcliff, 17 N. Y. 580.

After thus conceding (in par. 7) a delivery for storage, the statements at the beginning of par. 8, that there was no change of custody of the goods, and at the beginning of par. 9, that this defendant exercised no supervision or control are refuted by the further statement of this last-named paragraph that it did appoint a custodian, and tagged the goods with its name (Rec. 3, fols. 5, 6). That they were not so affixed as to identify the goods covered by the warehouse receipts is the argumentative conclusion of the pleader.

That the custodian was an employee of the pledgors did not affect the validity of the pledge.

Sumner v. Hamlett, 12 Pick. 76, per Shaw, C. J.
Combs v. Tuchelt, 24 Minn. 423.
1st N. Bk. v. Pa. Tr. Co. 60 C. C. A. 100.
Ky. Furnace v. Cy. N. Bk. 75 So. W. Rep., 848.
McComber v. Parker, 14 Pick. 497.

The tenth paragraph (Rec. 4 top) of the bill recites that, *after* the storing of the goods with it, this defendant prepared warehouse receipts (which the pleader, for the sake of its greater brevity, calls "security instruments") in the usual form of such documents" and representing that certain goods had been stored with it at its warehouse, Nos. 15, 17 Greene Street," etc. *(Id.)*. The receipts giving "the quality, value and amount" of the goods stored were sufficient to sustain the lien, without adding marks and numbers; the rest of par. II. (Rec. 4, fol. 6) being uncertain, argumentative and merely stating a conclusion. That such receipts suffice, see

N. Y. Security v. Lipman, 157 N. Y. 551, citing Blydenstein v. N. Y. Security, 67 F. R. 469.

See, also, the form of the receipt in 1st N. Bk. v. Dean, 137 N. Y. 113.

The twelfth paragraph (Rec. 4, fol. 6) states that the warehouse receipts were delivered to Dresser & Co., and thereafterwards were negotiated or "delivered in turn" to the several defendants and to "other parties" to secure loans *then* made. All those outstanding March 9, 1903, were in the hands of the defendants, which is the ground of their being made defendants—not because they did aught different from those "others" whose receipts happened to have been taken up prior to that date.

The succeeding paragraphs allege inconsequential circumstances, having no bearing upon any such suit

as sec. 70*e*, in any aspect, authorizes a trustee to bring in a district court. They relate to no transfer or act of the bankrupts.

V.

§70e. Transfer by bankrupt.

The statutory essentials to jurisdiction under this section, as already noticed *(ante*, p. 12) are (1) a transfer by the bankrupt; (2) which any creditor might have avoided; (3) of property or value not held by a *bona fide* holder.

In the case at bar, the only transfers by the bankrupts, Dresser & Co., were the lease to the Security Warehousing Co. and the negotiation of the warehouse receipts issued by that company against the goods stored with it.

Except by the prefix 'alleged,' the lease is not assailed by the bill. The complainant does not pray to have it adjudged void. (Rec. 8 top.) He states no ground for invalidating it; does not deny it was recorded conformably to law. His attack is upon the warehouse receipts and (especially) upon the action of the receivers after adjudication, with which the bankrupts had naught to do.

Yet it was the lease which created the original lien upon the goods stored upon the leased premises; or, rather, the deposit of the goods in the warehouse. The warehouse receipts increased the sum for which they were held, but did not create the right to detain them until whatever might be due was paid. They transferred the right to the goods on payment of the warehouse company's lien.

At common law, the deposit created the general lien; recognized by decisions and sustained by statute in New York, as in other states, 9 Wend. 268.

Brooks v. Hanover N. B. 26 F. R. 302 bot.

The statute gives a general lien upon all goods of the same owner for charges upon them; if some are removed, charges upon them are a lien upon those not removed.

Stallman v. Kimberly, 121 N. Y. 393, Affirming, 53 Hun, 531.

A further lien, for advances, &c., may attach by contract; like our lease, for instance.

Warehouse receipts are negotiable (26 F. R. 302, bot.).

The bill shows (Rec. 2, fol. 3, par. 2) The Security *Warehousing* Co. to be a lawfully-organized corporation of New York, which took a lease of Nos. 15-17 Greene St. as "*one* of its warehouses" and that all of Dresser & Co.'s goods in it had been delivered to this company for storage on those premises. (*Id.* 3, fol. 5.) The Warehousing Co. thereafter issued warehouse-receipts in the usual form (*Id.* 4, par. 10), some of which, by some 'turn' of negotiation, came into the hands of some of the defendants and other persons to secure loans. (*Ibid.* par. 12.) In other words, they were negotiated in due course, for value.

We deny that such receipts, issued by a regular warehouseman in customary form, and negotiated for value, come within the terms or meaning of Sec. 90, found at p. 4 of appellant's brief, or are expected to be recorded. It is only instruments which are subjects of recording acts (like our lease) that come within that section. Neither the Court of Appeals, nor any other New York tribunal, have held ordinary warehouse receipts within the contemplation of this law. The very cases cited by appellant (*ubi sup.*) refute his statement.

In Yeuni v. McNamee, 45 N. Y. 614, the decision rests wholly upon the ground that the instrument "was *not* a warehouse receipt." (Id. 622, end of Opin.) "It is obvious that, as between Stokes and Chapman, the receipt was a mere nullity." (*Id.* 619, mid.) The bill herein states, as the ground of going into equity, that

the warehouse receipts held by "the various defendants" are *valid* as between them and Dresser & Co. (Rec. 6, 7; par. 28.)

Button v. Rathbone, 126 N. Y. 187, also cited *(ubi sup.)*, the case of a mortgage, has no bearing on the present case to the point for which appellant cites it; but it does hold that "creditors" in the cited section 90, refers exclusively to judgment creditors—one "armed with some process" as distinguished from "a mere creditor at large." (126 N. Y. 191 middle.)

Van Deusen v. Radcliff, 17 N. Y. 584.
Jones v. Graham, 77 *Id.* 628.
Stephens v. Meriden, 160 *Id.* 178.
Sheldon v. Wickham, 161 *Id.* 503 bot.

Citing these cases, the Circuit Court of Appeals for the Second Circuit arrived at the logical conclusion that a trustee in bankruptcy could avoid a transfer only to the extent that a judgment creditor could.

N. Y. Econom. Printg. Co. 49 C. C. A. 133.

The same Court followed that decision in affirming the Kellogg case (112 F. R. 52) which was affirmed by this Court, on the same ground, *sub nomine*

Hewit v. Berlin, 194 U. S. 302-3.
Thompson v. Fairbanks, 196 *Id.* 526,
Citing Garcewich, 115 F. R. 99 & citations.
53 C. C. A. 510.

The bill does not state (could not, truly) *that there was* in existence, at the date of adjudication, *any creditor of Dresser & Co.* "armed with legal *process*," and thus *qualified to raise any question under section 90* of the State law, even if that applies to warehouse receipts.

VI.

Bona fide holder.

The third statutory element is that the recovery must be sought from one not a *bona fide* holder for value.

The trustee can avoid a transfer which any creditor could, and recover the property, or its value from the transferee, "*unless he was a bona fide holder for value* prior to the date of the adjudication. Such property may be recovered, or its value collected, from whoever may have received it EXCEPT a *bona fide* holder for value." (Sec. 70*e*.)

"For the purpose of *such* recovery," [from one not holding *bona fide*—and for that purpose only] the courts of bankruptcy are given jurisdiction.

This paragraph *e* being intended to define a statutory jurisdiction, every element of this definition must be stated in a complaint asking a hearing in this court, including the bad faith of, or non-payment of value by, the defendant. Every holder in good faith, for value, is immune from attack by the trustee; hence, an averment (in effect) that the defendant is *not* such holder is an averment vitally necessary to sustain jurisdiction against a demurrer. The trustee can drag into court no one against whom he is unwilling to make this charge.

The presumption against jurisdiction, in addition to the ordinary rules of pleading, require the trustee to make this charge, affirmative in fact, even if negative in form. (Potter's Dwarris, 119; 1 Kent, Com. 468.)

As Mr. Endlich says;—

"The effect of an exception which is part of the enacting clause, and is of general application is to restrict from application to the matters excepted the general language of the section or statute which, without the exception, would have included the same", adding in a note;—"It follows that in an action based on the statute *the pleadings must negative an exception*

contained in the enacting clause, as otherwise *it cannot be seen that the general language of the statute embraces the particular case*". Endlich on Stats. Sec. 184, p. 253. He explains "enacting clause" to mean the body of the statute. (15 Pet. § * 445.)

Wayman v. Southard, 10 W. * 30.

Facts must be averred showing that a defendant is not within the exception of the statute. Whatever is necessary to give a right of action to the plaintiff must be averred.

Walker v. Johnson, 2 McLean, 92.

The following excerpt from Judge McLEAN'S opinion shows the pertinency of his decision to the case at bar:

"The statute does not originate the cause of action; but it protects the defendant from an action unless he be *charged* with fraud, negligence or waste. Now, is this matter of defence to be set up by the defendant, or is it *inseparably connected with the plaintiff's case?* An executor or administrator can only be made personally responsible by suggesting a devastavit; and this suggestion must also be made in the declaration. Now, in the present case, the defendant is not liable to be sued, unless fraud, negligence or waste be *charged.*"

Walker v. Johnson, 2 McL. 96, 97.

Clough v. Shepherd, 31 N. H. 494,

where that court say the principle, though more often declared in penal actions, is equally applicable to civil cases; citing Vavasour v. Ormod, 6 B. & C. 431 (debt upon a lease) and other authorities.

See the following bankruptcy cases: Bellah, 116 F. R. 69; Pilger, 118 *Id.* 206; Brett, 130 *Id.* 983; Taylor, 42 C. C. A. 1.

The Maine Court said:—

"This is a suit in equity. In regard to such suits, the jurisdiction of this court is limited and specific. Even in courts of general equity jurisdiction, a bill in equity must state a cause within the appropriate jurisdiction as a court of equity"; and within such court's limitations, of course, whatever they may be.

Chase v. Palmer, 23 Me. 345; Whitman, C. J.

Ex p. Smith, 94 U. S. 456, bot.

Wellsboro' v. R. R. 76 N. Y. 182.

Where jurisdiction depends upon diverse citizenship, the averments, though affirmative in form, are really only to negative the idea of a common citizenship. Conversely, it is the existence of bad faith that is to be proved by plaintiff (21 Wall. 359) although, in form, alleging the want of good faith.

This allegation is as vital as that of citizenship where jurisdiction depends upon that fact.

The burden of proving bad faith is on assailant of taker's title; hence, he must allege it. Hotchkiss v. Nat. Bks. 21 Wall. 359 and citations.

Under those provisions relating to preferences, or fraudulent conveyances, within four or six months, it has been said repeatedly that the transferree's "cause to believe" the bankrupt's purpose to be to evade the law must be alleged. This is equivalent to '*bona fide*' in section 70*e*—except the proof of bad faith would have to be more stringent under this latter section.

Kaufman v. Tredway, 195 U. S. 271.

The bill nowhere charges that defendants were not holders for value. On the contrary, it declares the transaction which the trustee attacks, and the warehouse receipts issued under it, were for the purpose of borrowing large sums of money (Rec. pp. 3 and 4, Pars. 6, 7 and 12). This last paragraph (12) says these receipts were delivered "to secure certain loans." (Rec. 4, fol. 7.)

Bad faith, or the absence of good faith, is nowhere charged. The statement that defendants took them "to *secure*" present loans certainly leads to the inference of good faith.

It is shown that Dresser & Co. gave a lease to the Security Warehousing Co.; that a custodian of the goods was designated by this Company; it tagged the goods; and thereupon it issued these warehouse receipts, "after" the storage of the goods. (Rec. 4, top, par. 10.) Subsequent neglect or inattention on the

part of the Warehousing Co., or its custodian, could not invalidate these instruments, taken in good faith and for value at their inception, or afterwards. Suppose the methods adopted were ultimately found to be injudicious and insufficient for protection of the goods; that does not make them void *ab initio*.

That the Warehouse Co. let Dresser & Co. have money on these receipts is evidence that, even if careless, it acted in good faith, and without knowledge that any removal of goods by Dresser & Co. was permitted by its custodian, if such be the fact.

There is no claim that any other defendant had knowledge or notice of any one of the recited circumstances, even if they occurred as stated. Indeed, *it is not alleged that the Security Warehousing Co. had any such knowledge or notice.* There is only the general, insufficient, allegation that "the defendants knew OR *ought to have known*" the matters mentioned.

That such an alternative averment states neither fact has been already shown. (See *ante*, p. 15)

If the alternative averment did not neutralize itself, we could claim that it simply averred the defendants "*ought* to have known" the indicated matters—which is mere opinion, not fact; a conclusion of law, not admitted by the demurrer; which admits only facts "positively alleged; not every fanciful pretence suggested". Baker v. Booker, 6 Price, 581.

The fair implication from the statement that defendants "ought to have known" is that (although, in plaintiff's opinion, they 'ought') they did *not* know. This law imposes no penalty upon ignorance, unless a creditor has reasonable cause to believe; which implies a knowledge of circumstances naturally inducing belief. Here, the utmost the allegation can be supposed to imply is that defendants 'ought' to (but did not) know the circumstances. The averment of "satisfactory cause" held not to be equivalent to "reasonable cause". Smith v. Bean, 130 Mass. 298.

According to the ordinary course of business, it is seldom the case that the holder of a warehouse receipt

is cognizant of all that is done at the warehouse. If we can venture to offer a suggestion as to the individual defendants, it is not reasonable to suppose that they took these "security instruments" for their loans knowing or believing all those matters to be true which are charged in this bill.

This Court, per FIELD, J., said;

"A suspicion that there is a defect in title in the holder, or a knowledge of circumstances that might excite suspicion in the mind of a cautious person, or *even gross negligence* at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, *which implies guilty knowledge* or wilful ignorance, and the burden of proof lies on the assailant of the title."

Hotchkiss v. Nat. Bks. 21 Wall. 359.
Murray v. Lardner, 2 *Id.* 110.
Jacobs v. Morrison, 136 N. Y. 104–5.

Warehouse receipts have been so generally issued and transferred in recent years that they have become entitled to the privileges of negotiable paper; but this is immaterial, as section 70*e* gives every honest transferee the same protection.

New York State law does the same; as will be seen by reference to the "Personal Property Act."

SECTION 29. This article does not affect or impair the title of a purchaser or *incumbrancer* for a valuable consideration, unless it appear that such purchaser or incumbrancer had *previous* notice of the fraudulent intent of his *immediate* vendor, or of the fraud rendering void the title of *such* vendor."

So no creditor in this state could have shown a cause of action without averring *mala fides* of this character.

The bill (4, par. 12) does not indicate the "immediate vendor" of the defendants.

VII.

Consent of the proposed defendant.

It is not the defendant's consent that is made a condition precedent to jurisdiction, but that of the person whom the trustee preposes to make a defendant.

A 'proposed' defendant is not one *in esse*, but a person intended to be made such *in futuro*. (27 App. Div. 110.) The purpose to sue him in a bankruptcy court must be communicated, and assented to by him, *before* service of the summons; for that service makes him, *eo instanti*, a defendant, calling him into court to make *some* defense. (184 U. S. 26.)

Unless obvious necessity compels, no statutory word should be rejected as insensible or superfluous; but should be taken according to its ordinary meaning. (16 Howd. 261.) This word 'proposed', inserted in the original, and retained in the amended, act cannot have been employed inadvertently. It would have been simpler to have omitted it, if the consent of one already sued had been intended; but such was not the intention. It was not designed that the dockets of the federal courts should be lumbered up with cases in regard to which it was problematical, at the time of their entry, whether jurisdiction could be retained. The intention was to transfer from the plaintiff to the defendant the election of the tribunal in which such litigation should be conducted. It limited the jurisdiction of federal courts to such persons, not otherwise amenable to it, as had consented thereto; Congress having power to impose any limitation seeming to it good.

If, then, this be a jurisdictional fact, it should be alleged in the complaint; and the present one contains no such allegation.

Of course, if a defendant goes on to litigate the merits, he estops himself from making the objection; no man can complain of a judgment, or proceeding, to which he has assented. (Thompson v. Perkins, 57 Me. 290.) *Ex. gr.*, a petitioner for the location of a way

cannot have the proceedings quashed as irregular; nor can the promoter of an act contest its constitutionality. *Volenti non*, etc.

Section 23 does not say simply no suit shall be *brought* without the consent of the proposed defendant; it adds "*or prosecuted.*" Consent to the *prosecution* of a suit requires something more than merely appearing to demur.

The Bardes case went up on a demurrer to the jurisdiction. (178 U. S. 525 mid.)

In re Thomson, 112 F. R. 946.
Donnelly v. Cordage Co. 66 *Id.* 613.

In St. Louis Ry. v. McBride, 141 U. S. 127 (as in many prior cases) it was held that, by appearing generally and *pleading to the merits* one waives the objection that he is sued out of his district (*Id.*, 131).

Referring to this case, LOWELL, D. J., cites Louv. Tr. Co. vs. Cominger, 184 U. S., 26, as an authoritative determination that the consent required by Sec. 23 must be *more complete* than it was in St. Louis v. Mc-Bride.

In re Mitchie, 116 Fed. R. 725.
In re Steuer, 104 *Id.* 977.
Hemley-Hutchinson, 105 Id. 909,
also in 5 Am. Bky. Rep. 569.

A "voluntary" appearance is one without service of summons, 17 Howd., 424; 10 Wall. 327.

A *defect* in service of summons may be waived; but *illegality* of service "is considered as waived only when the defendant, without having insisted upon it, pleads *in the first instance* to the merits."

Harkness v. Hyde, 98 U. S. 479.
Mex. Ry. v. Pinckney, 149 *Id.* 209, mid.
Reinstadtler v. Reeves, 33 F. R. 310, q. v.
Miller Co. v. Carpenter, 34 Id. 434.

A service in ordinary *form* compels defendant to appear; he may then elect to plead or demur, etc.

Gould v. Evansville, 91 U. S. 527; Cominger case, 184 *Id.* 26.

'Consent' implies concurrence; affirmative action.

De Klyn v. Gould, 165 N. Y. 288 Mid.
Cocks v. Gooch, 52 Tenn. 310.
Geddes v. Bowden, 19 So. Car. 7.
Aull v. Columbia, 42 *Id.* 436.

Consent not merely that an action may be brought, but also prosecuted is the condition.

The eleventh amendment to the Constitution contains a similar phrase; thus construed by this Court, per MARSHALL, C. J.;

"To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute a suit according to the ordinary acceptation of language is to continue that demand."

Cohens v. Va. 6 Wheat. 408.
Knowlton v. Read, 11 N. J. L. 321, quoting 1 Pa. 360.
Marryott v. Young, 33 N. J. L. 337, bot.

Our demurrer to the jurisdiction, filed on the first day upon which your rules required us to plead, indicated our refusal to consent to the bringing and to the further prosecution of the plaintiff's demand in the district court.

VIII.

Reply to plaintiff's points.

Neither the learned judge nor the defendants are impaled upon either horn of the plaintiff's "dilemma." *(His Brief, p. 10).*

If the property were in the possession of the court there would be no ground for bringing a plenary bill in equity, especially without defendant's consent. Such possession, if actually or constructively retained (as the plaintiff erroneously assumes) would obviate

all necessity for a bill and allow resort to proceedings in bankruptcy, as *in rem*.

A mere transfer by the bankrupts, more than four mos. prior to bankruptcy, would not suffice to give jurisdiction, without the consent of the defendant; nor with it, unless the bill showed affirmatively that the transfer sought to be avoided was by the bankrupt; of a character making it open to attack by an existing qualified creditor; and recovery sought from one not a *bona fide* holder for value. If a preference, that would be immaterial.

Plaintiff's two propositions (His brief, p. 11) antagonize one another.

If his first proposition, on which he has always strenuously insisted—that the property was in the custody of the court—were correct, it would upset his second—of jurisdiction to maintain a plenary bill under sec. 70*e*. That manifestly contemplates a subject-matter examinable, at the trustee's election, either in the state or federal court; whereas no state court would have authority to determine status or title as to goods in the custody of a court of bankruptcy. (178 U. S. 542.)

The suit under that section is expressly to "recover" the *res* or its value; language inapplicable to things already in the possession of the Court.

Though both of plaintiff's propositions cannot be right, both can be (and are) wrong.

Throughout this controversy, plaintiff has refused to recognize the distinction between a plenary bill in equity and proceedings in bankruptcy.

At the commencement of his first 'point' (His brief, 13) the appellant states his 'contention' to be "that this case falls within the class of cases represented by White vs. Schloerb" (a proceeding in bankruptcy) "and *not* within Bardes vs. Bank"—a plenary bill in equity.

Thereby he excludes himself from sec. 70*e*, without bringing himself within any other provision of the

bankruptcy act; for that section confines itself to matters of *concurrent* jurisdiction.

That the bill alleged possession by Dresser & Co. and by the receivers only argumentatively, refuting it by its allegations of specific facts has been already noticed *(ante*, p. 16); but we will add that these recited *facts* support Judge HOLT'S statement as to possession, criticised at pp. 13, 14 of appellant's brief.

It will be borne in mind that Mr. McKenzie was made an assignee under a voluntary assignment two days before receivers in bankruptcy were appointed, so there could be no possession by Dresser & Co. at this later date. (Rec. 2, fol. 4.)

It is useless to notice citations relating to the conduct or rights of receivers operating railroads, etc. (Appellant's brief, pp. 14, 15.)

To the statement, on p. 16, that "a third party states it has issued warehouse-receipts," we reply that the plaintiff's bill states that this defendant had done that thing, more than four months before bankruptcy. (Rec. 4, par. 10.)

The statements on p. 17 of appellant's brief are strikingly incorrect; the trustee did not appeal to the court to decide whether the receivers had acted properly; without making either of them a party, he sues the defendants for *the value* of goods that he says have been sold and their proceeds distributed.

The 'reply' he puts into the mouth of the court is ludicrously variant from what Judge HOLT really said and appellant's brief, foot of p. 18. The suppositious 'reply' commences;—"It is true that this court did take into its custody property of great value" etc. (Brief, 17.) Judge HOLT'S opinion is that this property never was *in custodia legis*. (Rec. 16, fol. 28.)

At the top of p. 19 of his brief appellant says "The defendants are not *bona fide* holders;" but *he failed to say so in the bill*, as already noticed. *(Ante*, p. 21.)

Not making the lease an exhibit, he has no ground for asserting that the defendants were "not *bona fide* holders of the accounts" (Brief, p. 19) and he errs in

stating that "the bill discloses the fact that the accounts collected had nothing to do with the silk pledged." *(Ibid.)* The bill shows nothing of the kind. On the contrary, it is easily inferable from its par. 22 (Rec. 5, 6) that the monies collected did represent the goods sold.

If warehoused silks were sold, the receipt-holders, and this defendant under its lease, had an equitable lien on the proceeds. Nichols v. Higgins, 19 U. S. Ap 148.

Hovey v. Elliott, 118 N. Y. 136-7.

"A prior lien gives a prior claim which is entitled to prior satisfaction out of the subject it binds." Quoted in 3 How. 332 from 12 Wh. 180.

NOT A SINGLE ONE OF THE NUMEROUS BANKRUPTCY CASES CITED BY THE APPELLANT ON THE QUESTION OF JURISDICTION SUPPORTS HIS CONTENTION as to the asserted right to contest the title of an adversary possessor of goods in the district Court by a plenary bill without the defendant's consent; not one sustains his contention as to the property being *in custodia legis* under our state of facts except, possibly, *in re* Leeds Woolen Mills, 129 F. R. 922 (*a bankruptcy proceeding*) extensively quoted from by plaintiff in the Court below, but which was unanimously reversed by the Circuit Court of Appeals, composed of LURTON, SEVERENS and RICHARDS, C. Js. (opinion by the senior judge) *sub nomine*

Hinds v. Moore, 134 F. R. 222.

The opinion not only reversed Judge HAMMOND'S ruling, but overset the theory upon which it was based. (*Ibid.*)

The general allegations of a trust (Rec. 6, 7; pars. 26 and 31) amount to nothing. No 'trust' attaches until the subject of it comes into the hands of the trustee.

Murray v. Clarendon, L. R., 9 Eq. 18.
Fogg v. Blair, 133 U. S. 534.
Hollins v. Iron Co. 150 *Id.* 787.

Every bankruptcy decision cited by appellant is either made in a bankruptcy proceeding, or relates to a preference within four months.

He refuses to recognize the distinction between such cases and those brought into court by a plenary bill in equity, although distinctly stated by the Circuit Court of Appeals in the Second Circuit, as well as by the Supreme Court.

In the Kellogg case, the opinion, per TOWNSEND, C. J. (LACOMBE and COXE, JJ. concurring) says :—

> In view of the Supreme Court decisions, and many others, "it would seem that the controversies in relation to the bankrupt estate which—by reason of the limitations referred to in the clause 'except as herein otherwise provided for'—do *not* come within the jurisdiction of the bankruptcy courts are those *where the trustee must bring an independent suit to assert title to money or property not in the possession or control of the trustee.*"

In re Kellogg, 121 F. R. at p. 336.
IN RE ANDRE, per WALLACE, C. J. ;—13 Am. Bky. Rep. 132.
Kohn, 134 F. R. 557 (VII Circuit).
Dorsheimer v. Ott, *Id.* 740 (III Circuit).
Beach v. Macon, 116 *Id.* 143 (V Circuit).

The silks in question and their proceeds are not, and never were, "in the possession or control of the trustee." Therefore, he has to bring this "independent suit to assert title" to their proceeds. There never was any property or fund in Court. Throughout, the claims of these defendants have been adversary claims as to property the Security Warehousing Company had in its possession, and sold.

IX.

Conclusion.

The plaintiff, and we too, failed to find a single instance where such a suit as this has been sustained.

We do not reiterate, while we adhere to, the several objections to the bill as not stating the statutory facts requisite to give the Court jurisdiction.

The judgment of the court below should be affirmed.

EDWIN B. SMITH,
56 Pine Street,
New-York City,
Of counsel for the Security Warehousing Co.,
Appellee.

Supreme Court of the United States.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of DANIEL LEROY DRESSER and CHARLES E. RIESS, as members of the firm of Dresser & Co.,

Appellant,

AGAINST

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, THE SECURITY WAREHOUSING CO. and UNITED STATES MORTGAGE AND TRUST CO.,

Appellees.

BRIEF AND ARGUMENT FOR THE APPELLEES WENMAN, FISH AND BOLDT, ON APPEAL FROM DECREE SUSTAINING DEMURRERS AND DISMISSING BILL FOR WANT OF JURISDICTION.

Statement.

These appellees do not concede the correctness of the statement prefixed to the appellant's brief, and

particularly do not concede that the epithets characterizing various matters set forth in the bill are correct characterizations of those matters or are admitted by the demurrers to be such. Neither do the appellees concede that the numerous inferences and conclusions of law which are woven into the text of the bill are admitted by the demurrers.

1 Daniell's Chancery Pleading and Practice (6th Ed.), *p. 545 and notes.

The material facts alleged in the bill and which appear to these appellees to be admitted by the demurrers are as follows:

That the complainant was appointed, qualified and is acting as trustee in bankruptcy of Dresser and Riess, individually, and as members of the firm of Dresser & Co. (Record, p. 2, par. 1); that at the times mentioned in the bill and up to March 7, 1903, said Dresser and Riess were carrying on business as merchants under the name of Dresser & Co., at Nos. 15 and 17 Greene street, in the City of New York (*Ib.*); that for at least six months prior to March 7, 1903, Dresser & Co. were insolvent, and on that day they assigned all their property to Charles S. Mackenzie for the benefit of their creditors (pp. 2, 3, pars. 5, 6), that on March 9, 1903, Robert C. Morris and Charles S. Mackenzie were appointed receivers in bankruptcy of Dresser & Co., and of Dresser and Riess individually (pp. 2, 3, par. 5); that the goods dealt in by Dresser & Co. consisted for the most part of Japanese silk (p. 3, par. 6); that Dresser & Co. entered into an arrangement with the defendant The Security Warehousing Co. by which Dresser & Co. made a lease of their store, display and salesroom in the City of New York to the Security Warehousing Co. at a rental of one dollar per year (p. 3, par. 7); that there was no change of location of the goods, but Dresser & Co. sold and disposed of them, exhibiting the same to their

customers and sending such portions as they desired to the dyers and manipulators (p. 3, par. 8); that the Security Warehousing Co. exercised no supervision or control over the goods but employed one Gertrude B. Fish, the confidential clerk of Dresser & Co., as its custodian, in whose charge it was claimed the goods had been placed, paying or contracting to pay her a salary of one dollar a month (p. 3, par. 9); that she exercised no control or supervision over the goods and continued to act as the confidential clerk of Dresser & Co. (p. 3, par. 8); that the Security Warehousing Co. also placed tags on certain of the shelves, bins and counters on which the goods were stored and displayed for sale, upon which tags the name of the Security Warehousing Co. was printed, but the tags were not easily discernible (p. 3, par. 9); that the Security Warehousing Co. prepared certain instruments in writing (in the bill called Security Instruments) in the general form of warehouse receipts, purporting to be warehouse receipts and representing that certain goods had been stored with it at its warehouse 15–17 Greene street in the City of New York (which was the store of Dresser & Co.) (p. 4, par. 10); that the Security Instruments merely stated that goods of a certain quality, value and amount had been stored (p. 4, par 11); that these Security Instruments were delivered to Dresser & Co. and some were, in turn, delivered to the Security Warehousing Co., some to the U. S. Mortgage and Trust Co., some to the defendant Wenman for himself or for the defendants Fish and Boldt, and some to other parties, to secure loans made to Dresser & Co. (p. 4, par. 12); that all the Security Instruments outstanding on March 9, 1903, were held by the defendants (p. 4, par. 13); that Daniel LeRoy Dresser was one of the incorporators of the defendant The Security Warehousing Co. and from the time of its organization until after March 7, 1903, he was one of its directors and stockholders (p. 4, par. 14); that at the times of the delivery of the Security Instruments

Charles S. Mackenzie had been for some time and during all the times mentioned in the bill he continued to be the general counsel of the Security Warehousing Co., and was fully cognizant of the details of its business and of its system of storage hereinbefore described, and he was also the personal counsel and confidential representative of Daniel LeRoy Dresser (p. 4, par. 15); that, after the delivery of the Security Instruments to the defendants, Dresser & Co. continued to display for sale and to sell and dispose of the goods and to send the same to be dyed and otherwise manipulated, to all of which neither the Security Warehousing Co. nor any of the defendants made any objections, nor did they make any effort to prevent the sale and disposition of the goods and the management and control thereof by Dresser & Co. (pp. 4, 5, par. 16); that when the Receivers Morris and Mackenzie went into possession of the store, display and salesroom of Dresser & Co. on the 9th day of March, 1903, upwards of $150,000 worth of goods were there; that afterthe Receivers had taken possession of the store, the defendant The Security Warehousing Co. notified them that it claimed that the store, sales and display room belonged to it under the lease, and that the goods therein contained had been stored with it by the firm of Dresser & Co., and it demanded the delivery of all the goods (p. 5, par. 18); that the Receivers did not dispute this claim of the Security Warehousing Co., but acquiesced therein and complied therewith (p. 5, par. 19); that neither the Court nor the unsecured creditors of Dresser & Co. were advised of the facts concerning this claim (p. 5, par. 20); that thereafter the Security Warehousing Co. and the Receivers, Morris and Mackenzie entered into certain agreements under which some of the goods were sold by the latter as the agents of that company and the proceeds thereof paid over by them to it, without notice to the other creditors of the firm of Dresser & Co. and without any memoranda, account

or statement of what moneys were received from the sale of the goods claimed to be represented by any one of the Security Instruments, that the balance of the said goods were sold by the Security Warehousing Co. through other agents and without notice to the other creditors of Dresser & Co. (p. 5, par. 21); that the Security Warehousing Co. claimed to Morris and Mackenzie that certain of the goods so claimed to have been stored with it and represented by the Security Instruments had been sold by Dresser & Co. prior to the 7th day of March, 1903; that the amount so claimed to have been sold is unknown to the plaintiff, but he has been informed by Morris and Mackenzie, and he charges it to be true, that it exceeded in value the sum of $22,000, and that thereafter and subsequent to the 9th day of March, 1903, they collected certain accounts receivable of the firm of Dresser & Co. of upwards of $20,000 and paid over the same to the defendant, The Security Warehousing Co., without notice to the other creditors of Dresser & Co. (pp. 5, 6, par. 22); that all of these silk goods were sold and all of these accounts receivable were collected by the Security Warehousing Co. prior to the appointment of the complainant as trustee in bankruptcy of Dresser & Co. and none of the goods or their proceeds or of the accounts receivable have come into his possession except the sum of $1,944.93 paid to the complainant by the Security Warehousing Co. (p. 6, par. 23); that a large part of the proceeds of the goods sold and paid over to it and of the accounts receivable collected and paid over to it by Morris and Mackenzie and of the goods sold by it through other agents were in turn paid over by the Security Warehousing Co. to the other defendants as the holders of said Security Instruments and the balance of said proceeds were either retained by the Security Warehousing Co. or disbursed by it (p. 6, par. 24); that the books and records of the Security Warehousing Co., containing all of the entries and information concerning the sale and the disposition of said goods and the pro-

ceeds thereof and of the said accounts receivable, have all been lost or destroyed and no copies thereof are in existence nor are there any books, records, memoranda or other sources from or by means of which the complainant can ascertain the facts concerning said sale and disposition (p. 6, par. 27); that the net amount realized from the sale of the silk goods was less than $125,000, while the aggregate value of said goods as stated in the Security Instruments amounted to more than $150,000; that the values placed upon the said goods in said Security Instruments represented the cost price to the firm of Dresser & Co. which cost price averaged from twenty per cent. to forty per cent. less than the market value thereof (p. 7, par. 30).

BRIEF.

The appellant claims that the jurisdiction of the District Court, to entertain this suit, should have been sustained on two grounds, viz.:

"1st. Because the Court had custody of the silk "and accounts."

"2d. Because Sec. 70e of the Bankruptcy Act, as "amended, expressly confers jurisdiction of a suit "to set aside just such transfers as are disclosed by "the bill."

See Appellant's Brief, p. 11.

These two grounds on which jurisdiction is claimed are, of course, mutually destructive of each other. Sec. 70e deals with the avoiding of transfers *made by the bankrupt*, and, of course, if the property was transferred by the bankrupt it could not come into the possession of the Court on the adjudication, and so could not be *in custodia legis*. If, on the other hand, it did come into the possession of the Court on the adjudication, it could not previously have been transferred by the bankrupt.

The appellees Wenman, Fish and Boldt submit that the jurisdiction of the District Court cannot be sustained on either of these grounds, or on any other, and in support of this contention submit the following points:

I.

The bill is not framed as an application for the exercise of the summary jurisdiction of the Court of Bankruptcy and it seeks relief wholly beyond that jurisdiction.

The District Courts in matters of bankruptcy exercise jurisdiction in two entirely distinct ways, viz.:

(1) What is known as their summary jurisdiction based on their possession of the bankrupt's property or the pendency of the proceedings, designed to protect their possession of the assets, and exercised in a summary way upon petition and order to show cause. This jurisdiction is described and its limits defined in Bardes vs. Hawarden Bank, 178 U. S., 524, 530–35.

(2) A jurisdiction specifically conferred in a limited class of cases to entertain plenary suits between a trustee in bankruptcy and other parties.

The only jurisdiction which the court of bankruptcy acquires by virtue of its possession of property of the bankrupt, is the former, the so-called summary jurisdiction, conferred by Section 2 (7) of the present act, and exercised to protect that possession.

The present case is not an application to the Court for the exercise of this summary jurisdiction under Section 2 (7), but is a plenary suit commenced by the filing of a bill and the issue of a subpœna (see Record, p. 1, p. 8 [15]).

The plaintiff has cited no case, and we confidently assert that none can be cited in which the jurisdic-

tion conferred by Section 2 (7), as limited and defined by Bardes *v.* Hawarden Bank, has been exercised through the medium of a plenary suit. To hold that it could be done would be to disregard forms of procedure entirely and would be in direct conflict with the ruling of Bardes *v.* Hawarden Bank, that the jurisdiction conferred by Section 2 (7) is only the summary jurisdiction of the Court of Bankruptcy as such.

Nowhere in the bill can there be found a direct explicit statement that the property in question was ever in the custody of the Court or of the Receivers or that it was taken from them or yielded up by them in violation of their duty. The complainant now tries to spell out such allegations from the language of the bill, but it is obvious that he did not frame his bill on that theory. On the contrary both in his prayer for relief and also in the 29th paragraph of his bill (Record, p. 7) he distinctly suggests the possible validity of the transactions he attacks.

At page 11 of his brief, also, the appellant states, as one of his points on this appeal, that Section 70*e* confers jurisdiction of suits to set aside "*just such transfers as are disclosed by the bill*",—the transfers referred to in Section 70*e* being transfers "*by the bankrupt*" (See the section in question; also Point II., p. 18 of Appellant's Brief). If such are the transfers disclosed by the bill, whether they are voidable or not, the property did not pass into the possession of the receivers.

Further, the relief sought by this bill is not merely the relief which the Court of Bankruptcy may give in a proper case, upon proper proceedings, viz., to reclaim property taken from the possession

of the Court or held by a bailee of the bankrupt, but the bill seeks much more, to wit:

(*a.*) That the "Security Instruments" be declared invalid, fraudulent and void.

See prayer for relief (Record, p. 8).

(*b.*) That, in case any of the "Security Instruments" are decreed to be valid and the defendants entitled to hold and sell the goods and accounts, the defendants may be required to make discovery of all their acts in connection with the matter and pay over such amounts as they may be found, on accounting, to have received in excess of their claims against the goods on which they had liens.

Ibid.

(*c.*) That the defendants be required to pay dam ages for alleged improvident sales.

Ibid.

In other words, the plaintiff, in addition to an application for the return of the goods or their proceeds, which might have been framed—whether maintainable on the facts or not—under Section 2 (7) has put into his bill a suit to cancel the "Security Instruments," a suit for a discovery and accounting and a suit for damages for improvident sales, three things of which certainly the court of bankruptcy has no jurisdiction under Section 2 (7).

The fact is that the plaintiff has not ventured to rest his case on any one view of these transactions, but is trying here, as he did in a former suit in the State court, to attack the defendants on two theories at once—a course which resulted, in the State court, in his being in substance required to elect between a suit for an accounting and an action for conversion—after which decision the State court action was discontinued.

See Whitney *v.* Wenman, 96 App. Div. (N. Y.), 290.

The cases cited by the appellant do not sustain his argument as to the jurisdiction of this court over this suit.

White v. *Schloerb*, 178 U. S., 542, holds that the District Court, as a court of bankruptcy, obtains jurisdiction over property in possession of the bankrupt at the time of the filing of the petition and "has jurisdiction by summary proceedings to com-"pel the return of the property seized." We do not question this law, but it is not a ruling that the District Court has jurisdiction of a plenary suit involving not only the right of possession of property and the title to it, but also the setting aside of written instruments as void, discovery and accounting, and alleged claims for damages for improvident sales. The proceeding in the Schloerb case was a summary one, commenced by petition and order to show cause.

Mueller v. *Nugent*, 184 U. S., 1, was a proceeding instituted under the summary jurisdiction by petition and order to show cause against a bailee of the bankrupt. No question similar to the one here presented arose in that case, and there is nothing in that case to affect the ruling in Bardes *vs.* Hawarden Bank, 178 U. S., 524, that the jurisdiction conferred by Section 2 (7) was simply jurisdiction of bankruptcy proceedings as such, as distinguished from suits between party and party, and that Section 2, Subdivision (7), conferred no jurisdiction of such suits on the District Courts.

Minnesota Co. v. *St. Paul Co.*, 2 Wall., 609, was not a bankruptcy case and did not attempt to deal with the jurisdiction of courts of bankruptcy under any of the statutes. The objection to the jurisdiction in that case was taken on the ground that there was no diversity of citizenship to give jurisdiction to the Circuit Court in which the suit was brought. The decision of the Court on this branch of the case is contained in the following extract from the opinion of Mr. Justice Miller:

> "The present suit grows immediately out
> "of and is a necessity which arises from the

> " foreclosure suit and is really a continuation
> " of it.
> " The rights of the parties depend upon
> " the construction which is placed upon the
> " acts of the court in that suit; and the pres-
> " ent bill is necessary in order to have a
> " declaration of what was intended by the
> " orders and decrees made in that suit and
> " to enforce the rights which are established
> " by it."

If this were an authority for the claim that, whenever a proceeding in bankruptcy is pending, any suit by which the trustee seeks either to get possession of property, or to set aside transfers by the bankrupt, or to avoid written instruments, or to obtain a discovery or an accounting, is within the jurisdiction of the Bankruptcy Court, it would not only be at war with the ruling in Bardes *vs.* Hawarden Bank but it would mean that all the careful provisions of the Bankruptcy Act on the subject of jurisdiction are superfluous and meaningless.

The same observations apply to Morgan's Co. *vs.* Texas Central Ry. Co., 137 U. S., 171.

Sharpe *vs.* Doyle, 102 U. S., 686, involved no question of jurisdiction whatever, nor does it decide, as stated at page 15 of the appellant's brief that a receiver's act in delivering up property to a claimant is not binding on the Court and does not change the legal possession of the property.

The argument from inconvenience at pages 16 and 17 of the appellant's brief is without force. It begins by assuming everything which is claimed by appellant, but which, as above pointed out, the demurrers do not admit. Jurisdiction, of course, cannot be conferred upon a court by the fact that a litigant considers it more desirable to resort to it than to some other tribunal, and the appellant, in his supposed case, is not remediless, since the State courts are unquestionably open to him.

II.

Upon the facts as admitted by the demurrers it does not appear that the property was in custodia legis.

Unless, upon the facts as admitted by the demurrers, it is apparent that the property in question actually came into the possession of the Receivers in bankruptcy and so of the Court, jurisdiction of this suit cannot be sustained on the first ground stated in the appellant's brief (p. 11).

It cannot be maintained that the property in question did come into possession of the Receivers, except by treating the lease of Dresser & Co.'s store to the Security Warehousing Co., the possession of its custodian, the issue of the warehouse receipts or "Security Instruments" and the transfer of these instruments to the various defendants, as security for loans, as, one and all, void and of no effect.

It is evident from the bill that the appellant has not ventured to rest his case upon this theory alone. In paragraph 29 of the bill (Record, p. 7) he says, "if any or all of the Security Instruments *should* "*for any reason be held to be valid* as against your "orator, it is impossible," &c., &c. In paragraph 31 (Record, p. 7) he says again that he "is further "entitled, *in case any of said transactions be de-* "*creed to be valid*, to relief in equity," &c., &c. Again, in his prayer for relief (Record, p. 8) he asks, first, that the Security Instruments be decreed to be invalid, but, secondly, "*in case any of the security* "*instruments are decreed valid and effective* as "against your orator," then for a discovery and accounting and other relief.

Previous to the commencement of this suit the complainant had brought an action against these same defendants in the Supreme Court of New York

upon a complaint making substantially the same allegations, and asking substantially the same relief as in this suit. The Supreme Court held that in that case the plaintiff had improperly united causes of action for conversion and for an accounting, and made an order which substantially required the plaintiff to elect between them.

Whitney *vs.* Wenman, 96 App. Div. (N. Y.), 290.

The plaintiff, however, not venturing to rest his case upon the claim that the "Security Instruments" were invalid, abandoned the State Court action and resorted to the United States District Court with a bill of complaint, again seeking alternative relief upon alternative views of the legal effect of the transactions.

We submit therefore that, the complainant himself being judge, it is not conceded on the face of this bill that the transactions in question were void or consequently that the Court had possession of the property in question.

It is alleged in the bill that a lease of Dresser & Co.'s store had been made to the Security Warehousing Co.; that a custodian had been appointed by it who was on the premises, that instruments in the form of warehouse receipts had been issued by it for the goods on the premises, that these receipts had been transferred as security for loans, that the Security Warehousing Co. claimed to be in possession of the premises and the property—a claim which was recognized by the assignee and receiver who had every means of knowing the facts and who was acting under the responsibility of a bond.

Doubtless all these acts *may have been* invalid and all of these claims unsound. Doubtless the complainant would have a right to show them to be so, if he could, at the proper time and in a proper way.

But as the learned District Judge says in his opinion (Record, p. 16), these facts, alleged in the bill itself, cannot be simply disregarded and brushed aside as a sham in order to permit the Court to assume as a fact and as the basis of its jurisdiction that a precisely opposite state of facts existed. The only allegations of the bill which can be claimed as furnishing ground for such a course are merely the pleader's inferences and conclusions of law, which are not admitted by the demurrers.

In a case decided in August, 1904, in the U. S. Circuit Court for the Eastern District of Tennessee, *Bush et al. as Trustees in Bankruptcy* vs. *Export Storage Co., Security Warehousing Co., et al.* (the opinion not reported, but a printed copy submitted with this brief) warehouse receipts identical in form with those in question in this case, issued by the same company, under almost exactly the same circumstances, in pursuance of the same course of business and attacked on the same grounds, were sustained by the Court as valid.

We do not refer to this case as an authority on the present question and we are well aware this is not the time or place to argue the validity or invalidity of the "Security Instruments," but upon the question of whether the Court can "disregard and brush aside as sham" the "Security Instruments" in question it is pertinent to show that another Court, upon full hearing, has held precisely similar instruments to be valid.

In neither of the cases cited by the appellant at pages 4 and 20 of his brief (Yenni *v.* McNamee, 45 N. Y., 614, and Button *v.* Rathbone, 126 N. Y., 187), are the facts similar enough to those in the present case to make those cases authority for holding, on these demurrers, that the transactions set out in the bill were utterly void, and that the fact of possession was the direct contrary of what was claimed by the Security Warehousing Co. and admitted by the receivers.

III.

Jurisdiction of this suit is not conferred by Section 70e of the Bankruptcy Act.

Section 70e of the Bankruptcy Act authorizes the trustee to avoid any transfer which any creditor might have avoided, irrespective of the four months' period, and to recover such property or its value, and then provides:

> "For the purpose of such recovery any "court of bankruptcy as hereinbefore defined "and any State court which would have had "jurisdiction if bankruptcy had not inter- "vened shall have concurrent jurisdiction."

Standing alone, this might be held to give jurisdiction of this suit, but it must, of course, be read in connection with Section 23*b*. This section was carefully considered by this Court in Bardes *vs.* Hawarden Bank, 178 U. S., 524, and in that case this Court expressly held as follows:

> "1st. The provisions of the second clause "of Section 23 of the Bankrupt Act of 1898, "control and limit the jurisdiction of all "courts including the several District Courts "of the United States over suits brought by "trustees in bankruptcy to recover or collect "debts due from third parties or to set aside "transfers of property to third parties al- "leged to be fraudulent as against creditors, "including payments in money or property "to preferred creditors.
>
> "2d. The District Courts of the United "States can, by the proposed defendant's con- "sent but not otherwise, entertain jurisdic- "tion over suits brought by trustees in bank- "ruptcy to set aside fraudulent transfers of "money or property made by the bankrupt "to third parties before the institution of the "proceedings in bankruptcy."

These rulings were followed and reaffirmed a year later in Wall *v.* Cox, 181 U. S., 244.

The amendments made by the act of February 5, 1903, made no change in the language of Sec. 23 as it stood when Bardes *vs.* Hawarden Bank was decided, but merely added at the end of subdivision *b* the words

> " except suits for the recovery of property
> " under Sec. 60, Subd. *b*, and Sec. 67, Subd.
> " *e*."

It is not claimed or suggested that this suit is brought under either Sec, 60*b*. or Sec. 67*e*.

The limitation of Sec. 23*b* as construed by Bardes *vs.* Hawarden Bank applies therefore, in full force, to this suit.

The consistency of this limitation with the provision of Sec. 70*e* above quoted is made very plain by the case of

Gregory *v.* Atkinson, 11 Am. B. R., 495.

In that case Adams, *J.*, says (p. 497):

> " Section 70*e*, as amended, clearly enough
> " confers jurisdiction upon this Court over
> " the subject matter of fraudulent convey-
> " ances in violation of State statutes, irre-
> " spective of the time when made. But does
> " it go further and confer jurisdiction over
> " the persons of the defendants without
> " their consent? In very emphatic language,
> " Congress, by Section 23*b*, laid down a gen-
> " eral and comprehensive rule to the effect
> " that suits by the trustee shall only be
> " brought or prosecuted in the courts where
> " the bankrupt might have brought or prose-
> " cuted them, if proceedings in bankruptcy
> " had not been instituted, except by consent
> " of the proposed defendants. To this gen-
> " eral rule two exceptions already referred
> " to are expressly made. If Congress had
> " intended to except from this general rule
> " all actions to set aside fraudulent convey-
> " ances, as contemplated by Section 70*e*, no
> " reason is apparent why it did not, in terms,
> " except such actions from the operation of

"the general rule there laid down. Its attention was called to the subject, and it legislated on that subject. Under such circumstances, it is reasonable to conclude that it expressly mentioned all of the exceptions it intended to make. The amendment of February 5, 1903, conferring jurisdiction upon courts of bankruptcy, in common with State courts, for the recovery contemplated by Section 70*e*, must, in my opinion, be read in connection with Section 23*b*, and, when so read, means that jurisdiction over the subject matter of Section 70*e* is conferred upon this Court, but can be exercised only on the condition imposed by Section 23*b*, of securing the consent of the proposed defendants. This conclusion is re-enforced by the fact that, notwithstanding jurisdiction is conferred upon this Court by Section 23*b* to recover preferential payments and cancel fraudulent conveyances made within four months prior to bankruptcy proceedings without the consent of the proposed defendants, yet Congress, out of abundant precaution, saw fit, in both Sections 60*b* and 67*e*, to expressly provide for jurisdiction over the subject matter in such cases. The same precaution doubtless prompted Congress to confer general jurisdiction in common with State courts over suits contemplated by Section 70*e*, in cases where consent to the personal jurisdiction was made a prerequisite to the exercise of general jurisdiction over the subject."

Congress had this subject before it and deliberately struck out of the amendment of Sec. 23*b* the reference to Sec. 70*e*.

Collier on Bankruptcy (5th Ed.), 266,
36 Cong. Rec. (pt. I.), p. 1036.

These defendants have not, by appearing, given the consent required by Sec. 23*b*.

Consent of the defendant is required under the Bankruptcy Act not only to give jurisdiction of the person of the defendant, but to give the District

Court the right to adjudicate upon the subject matter of the particular case. By Sec. 70*e* the District Courts are given jurisdiction, generally, of the subject matter of plenary suits to set aside transfers, &c.—which, apart from statute, these courts would not have—but they can exercise this jurisdiction only subject to the qualification imposed by Sec. 23*b*, to wit, with the consent of the proposed defendant—which must be a consent to have the particular controversy adjudicated by the District Court.

To this effect are the decisions on the subject.

In re Hemby-Hutchinson Pub. Co., 5 Am. B. R., 569.

Louisville Trust Co. *v.* Comingor, 184 U. S., 18.

In re Michie, 8 Am. B. R., 734.

In the last cited case it is expressly stated that "a general appearance" was filed by the defendant and subsequently a demurrer to the jurisdiction. Judge Lowell's opinion contains a full discussion of the subject and decides that, for want of consent, there was no jurisdiction.

The cases cited by the appellant at page 21 of his brief do not hold, as there stated, that jurisdiction of such a suit as this can be entertained without the consent of the proposed defendant.

Horskins v. *Sanderson*, 132 Fed. Rep., 415, was a case relating to a transfer made within four months before the filing the petition and was brought under Sec. 67*e*. There is not even a dictum as to what would be the jurisdiction of this Court under Sec. 70*e* without consent of the defendant.

In re Leeds Woolen Mills, 129 Fed. Rep., 922, was a case of summary proceedings instituted by petition and order to show cause, and Judge Hammond's remarks at page 926 do not even allude to suits brought under Sec. 70*e* without the defendant's consent.

Pond vs. *National Exchange Bank*, 124 Fed. Rep., 992, was a suit to recover a preference under Sec. 60*b* and has nothing to do with suits under Sec. 70*e*.

In *Lawrence* vs *Lowrie*, 133 Fed. Rep., 995, it is evident from the report that the defendant appeared and litigated the matter in controversy on the merits, which, of course, gave consent, and the question of jurisdiction involved appears to have been not the one arising here but the question whether the suit could be entertained by the District Court in another district than that where the bankruptcy proceedings were pending.

In *Delta Nat. Bank* vs. *Easterbrook*, 133 Fed. Rep., 521, it does not clearly appear that the question here involved arose at any stage of the case, but it does clearly appear that the defendants appeared and defended on the merits and so gave consent to the jurisdiction.

IV.

No ground has been shown for upholding the jurisdiction of the District Court over this case, and the decree of that Court dismissing the bill for want of jurisdiction should be affirmed.

Respectfully submitted,

LOUIS F. DOYLE,
Of Counsel for Appellees Wenman,
Fish and Boldt.

FILE COPY.

Office Supreme Court U. S.
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MAY 2 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 576. WHITNEY, TR., v. WENMAN ET ALS.

Comment on appellant's reply-brief.

We should not avail ourselves of the Court's permission to comment upon appellant's reply had it not commenced with the erroneous assumption that our brief here argues propositions not discussed below. To correct this misapprehension, we send herewith to the Clerk's office (merely for reference, if any Justice cares to make it, not as part of the permanent record) ten copies of our original brief in the district court. We also filed there a reply enforcing and expanding our propositions and answering those of the plaintiff. A mere glance at the division-headings of our brief below will demonstrate that we relied then upon the same grounds of non-jurisdiction we do now; the differences being merely textual, arising from condensing our two briefs and from the occasion for answering the brief the appellant had filed here.

Our examination of the bill, which the plaintiff's reply calls "attacking the merits," was to ascertain if jurisdiction could be found in its allegations. (194 U. S. 118; our brief, 12: Div. IV.)

We have never confused 'warehouse receipts' with 'chattel-mortgages,' nor considered the former within Sec. 90 of the Lien Law.

In construing the word 'creditors' in the cited section to mean only judgment creditors, the Circuit

Court of Appeals in the Second Circuit was but accepting the construction given by the N. Y. Court of Appeals.

Stephens v. Meriden, 160 N. Y. 168.
Sheldon v. Wickham, 161 *Id.* 500.

There is no charge of fraud in the bill, but a statement that these warehouse receipts came to the defendants for full value paid. To take customary security for a present loan is no fraud.

At that very page (32) of our brief which the reply cites as saying appellant's remedy was by summary proceedings, we say precisely the contrary; that, because the property was never in the custody of the Court, or possession of the trustee, he had to bring an "independent suit." He brought it in the wrong tribunal, upon insufficient allegations.

Our disregard of cases like Minne. v. St. Paul was not that they were railroad cases merely, but because they related to property unquestionably in the custody and under the control of the Court; while here the trustee, never having had possession, is suing to recover the value of property which has been sold, and the proceeds scattered.

An ancillary suit is one 'subordinate' or 'auxiliary' to some principal. (31 App. Div. 389.) An ancillary bill is one arising out of, and dependent upon, other original proceedings.

Coltrane v. Templeton, 45 C. C. A. 328.

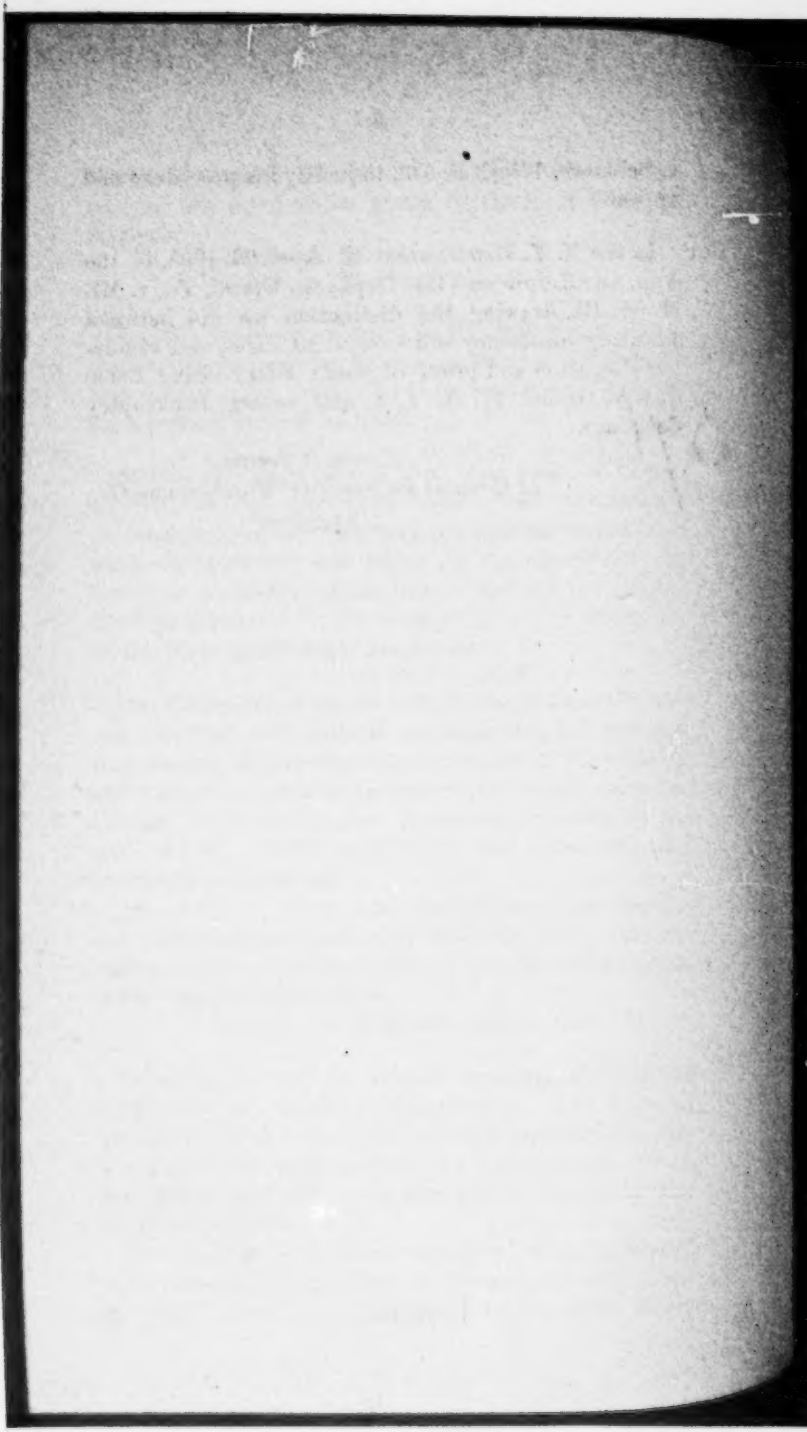
Summary proceedings actually pending might afford a basis for an ancillary bill, possibly. The claimed, but *unexercised*, "right to proceed summarily" certainly does *not* carry with it as a consequence, *per se*, the right to institute a plenary bill in equity in the bankruptcy court.

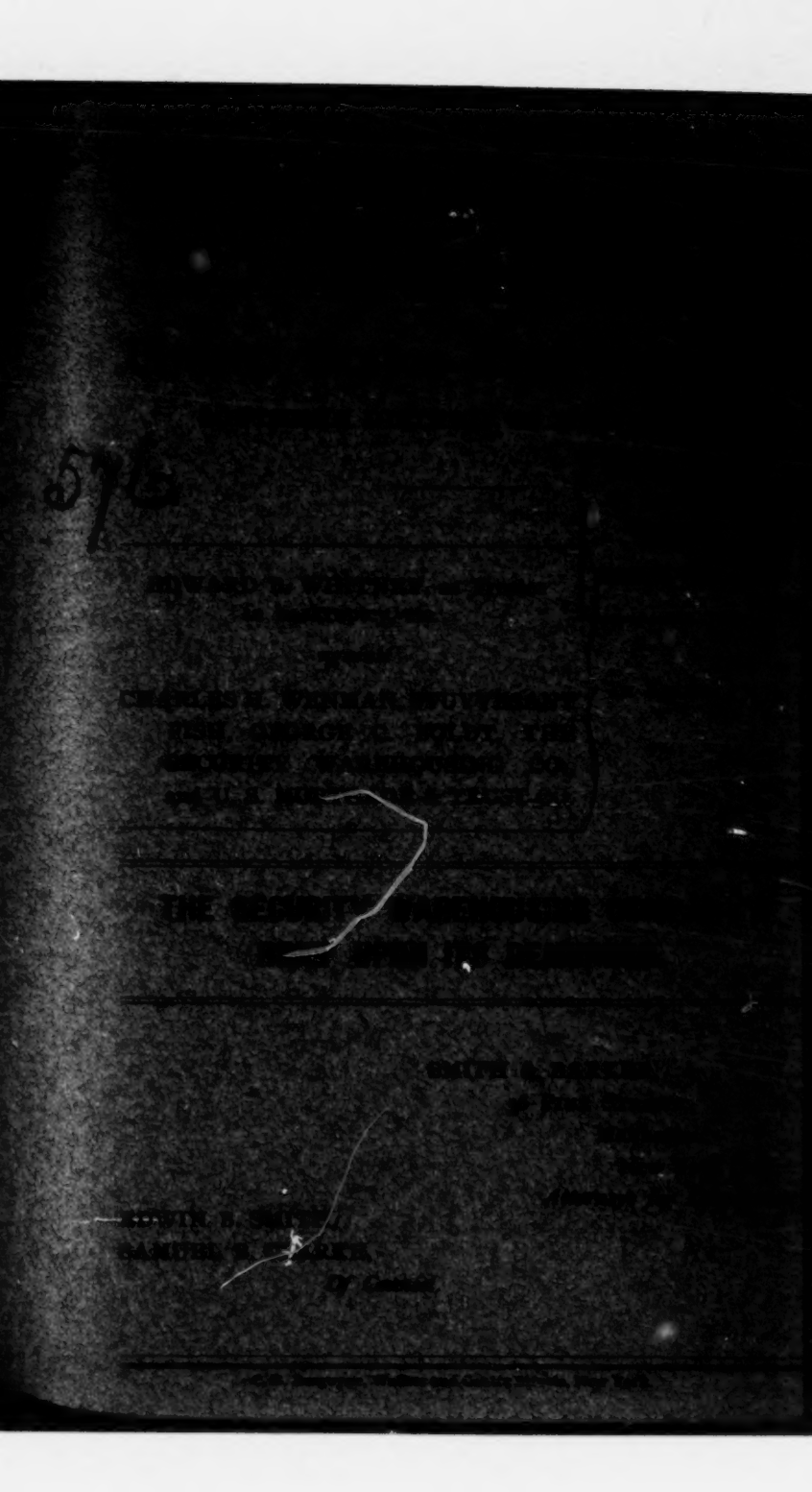
The appellant confounds 'ancillary' with 'plenary,' as he does the proceedings in bankruptcy with a bill in equity. Ending as he began, he relies upon White

v. Schloerb, 178 U. S. 542, to justify his procedure and appeal.

In the N. Y. Law Journal of April 26, 1905, is the App. Divn. opinion (1st Dept.) in Upson, Tr., v. Mt. Morris Bk. drawing the distinction we did between statutory insolvency and *solvere ad diem*, and requiring allegation and proof of *mala fides;* citing Benedict v. Dashel, 177 N. Y. 1, and several bankruptcy decisions.

EDWIN B. SMITH,
of Counsel for Security Warehousing Co.,
Appellee.





United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as members of the firm of Dresser & Co.	
AGAINST	In Equity.
CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, the SECURITY WAREHOUSING COMPANY, and UNITED STATES MORTGAGE & TRUST COMPANY.	

SECURITY WAREHOUSING COMPANY'S BRIEF ON DEMURRER.

I.

Preliminary.

As to every federal court below the Supreme, "the fair presumption is that a cause is without its jurisdiction till the contrary appears." (4 Dallas, 8 and 12.)

"This renders it necessary, inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears, or can be presumed, to set

forth upon the record of a circuit court the facts and circumstances which give jurisdiction, either expressly, or in such a manner as to render them certain by legal intendment." Turner v. Bank, 4 Dallas, 11.

Dred Scott, 19 Howd. 401; 97 U. S. 649.
Grace v. Am. Co. 109 U. S. 283; 4; and cases passim.
Hubbard v. No. R. R. 3 Blatch. 84.
Ex p. Smith, 94 U. S. 456.

The right being statutory, "before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the Statute." (95 U. S., 185, bottom.) MORROW, C. J., says:—"We are confronted at once with the presumption that the cause is without the jurisdiction, unless the contrary affirmatively appears," citing cases to show that "the court would infer or presume against jurisdiction, but not in its favor."

Fife v. Whittell, 102 Fed. R., 539, 540.
Real Est. Tr. Co. v. Thompson, 112 *Id.*, 946, bot.

It becomes necessary, then, carefully to consider the statutory provisions of the Bankrupt Act of 1898 (as amended February 5, 1903) and to compare with them those statements of facts in the bill of complaint which a demurrer admits, to see if these make out a case so "specially circumstanced" (4 Dall., 11) as to bring it within the jurisdiction of this Court.

II.

Statutory Provisions.

Before taking up any section of the law, let it be premi ed that the inquiry does not relate to an exercise of the authority of the Court over an estate being administered in bankruptcy, but relates to the con-

ditions which allow it jurisdiction over a plenary bill in equity. Sect. 23*a* makes this distinction. *In re* Gray, 47 App. Div., 557; 178 U. S. 532-3.

(1.) Section 23*b* allows the trustee to sue only in that forum in which the bankrupt (had he not been petitioned into bankruptcy) could have sued "unless by consent of the *proposed* defendant," except suits for the recovery of property under section 60 subdivision *b*, and section 67, subdivision *e*.

It does not except suits brought under sec. 70*e*. *Exceptio unius, etc.*

This will be further discussed when we come to consider this last-mentioned section.

(2.) Section 60 *b* relates only to preferences shown within four months of the filing of the petition. Kindt, 101 F. R. 107.

The bill sets forth no preference; nor complains of any act of the bankrupt with either defendant within four months.

Its sixth paragraph says it was "For at least six months prior to the seventh day of March, 1903", that Dresser & Co. were insolvent; and were "only able to continue in business by borrowing large sums of money" upon a pledge of goods, and "to conceal from their unsecured creditors *the fact* that the same were pledged"; to accomplish which they entered into arrangement with the Security Warehousing Company, "for the purpose of pledging these goods with certain of their creditors", etc. (Par. 7.)

The twelfth paragraph indicates the holders of the warehouse receipts ("for brevity" called by the complainant "Security Instruments") as the "certain creditors" to whom goods were pledged by the borrowers, Dresser & Co., for loans made to them to enable them to continue in business.

The bill seems to lay stress upon the omission by Dresser & Co. to notify "other creditors" of these loans and pledges; as if it were the customary thing for merchants borrowing from banks or individuals to

send around to everybody they owe notices of the accommodation obtained!

The fifteenth paragraph intimates that Mr. Dresser's "personal counsel and confidential adviser" ought to have communicated all thus learned to his other client, the Security Warehousing Company.

Conn. Life v. Schaeffer, 94 U. S. 457.

As to subdivision *b* of Section 60, it is enough to say that the bill affirmatively shows the pledge of Dresser & Co's. goods to have been made more than six months before March 9, 1903, for present loans to the amount of the liens, so the estate of Dresser & Co. was not diminished thereby. This did not constitute a preference. It was only in good faith the lenders parted with their moneys.

There is no allegation or statement indicating that either defendant, or any agent acting therein, had "reasonable cause to believe" a preference was intended.

Nor was there any preference: the pledge being made to raise funds of equal value for immediate use to pay existing creditors. As Judge J. B. McPherson says;—"instead of owing John Doe and Richard Roe, he owed the bank". *In re* Davidson, 109 Fed. R. 884.

See also the language of Hazel, J., in Young v. Upson, 115 *Id.* 194.

Nor had any party "reasonable cause to believe" a preference was intended, or even to suspect it—which is a different thing.

Grant v. Nat. Bk. 97 U. S. 81.
Stucky v. Masonic Bk. 108 *Id.* 75.

The burden is upon the trustee to maintain the proposition that the defendants had reasonable cause to believe.

Barbour v. Priest, 103 U. S. 296.
Kaufman v. Tredway, 195 *Id.* 273.
Forbes v. Howe, 102 Mass. 436 bot.
Parsons v. Topliff, 119 *Id.* 248.
Otis v. Hadley, 112 *Id.* 106, Gray, J.
Harmon v. Feldheim, 131 Mich. 470.
Netter v. Refowick, 12 Pa. Dist. 196.

Complainant can only recover *secundum allegata et probata;* hence, he must allege this fact, especially as it is one essential to the jurisdiction of this Court. Nowhere does he allege it.

In paragraph 17 of the bill, it is said all the defendants "knew OR *ought to have known*" certain circumstances affecting the warehouse receipts.

The courts of New York, and the U. S. Circuit Court of Appeals (here sitting) have held, "to state in the alternative is to state neither the one nor the other fact. Such an alternative statement of grounds results in a mutual exclusion." Cronin v. Crooks, 143 N. Y. 354, affirming 76 Hun, 124, and citing numerous decisions.

U. S. v. McCreery, 62 U. S. Ap. 337.
Collins v. Beebe, 27 N. Y. St. 5.
State v. Smith, 61 Me. 386.
Brown v. Keene, 8 Pet. *115.

"It is no answer to an objection to averments made in the alternative to say that, if either averment is true, the plaintiff has alleged a cause of action." Jamison v. King, 50 Cal. 136.

Potter v. Herman, 8 *Id.* 623, FIELD, C. J.

No such contention could be made in the present case. Welsford says the one rule of equity pleading strictly applied is "that the pleading will be construed most strongly against the party pleading." (Welsf. Eq. Pl. 10.) Farren states that the complainant cannot be supposed to have any greater right, or the defendant any more guilt, than the pleadings [thus construed] set forth. (Bill in Ch. 1, 2.) The application of this rule is equally well known, universal and stringent as the rule itself, viz.:—that where the pleading is ambiguous and susceptible of two interpretations, the demurrant may adopt that most favorable to himself and "most against the plaintiff's interest." (Welsf. 126 mid.; Mitf. 128, note 1.)

Vernon v. Vernon, 2 Myl. & Cr. 145.

If the alternative averment did not neutralize itself, we could claim that it simply averred the defendants "*ought* to have known" the indicated matters—which is mere opinion, not fact; a conclusion of law, not admitted by the demurrer; which admits only facts "positively alleged; not every fanciful pretence suggested". Baker v. Booker, 6 Price, 581.

The fair implication from the statement that defendants "ought to have known" is that (although they 'ought') they did *not* know. This law imposes no penalty upon ignorance, unless a creditor has reasonable cause to believe; which implies a knowledge of circumstances naturally inducing belief. Here, the utmost the allegation can be supposed to imply is that defendants 'ought' to (but did not) know the circumstances. The averment of "satisfactory cause" is held not to be equivalent to "reasonable cause". Smith v. Bean, 130 Mass. 298.

According to the ordinary course of business, it is seldom the case that the holder of a warehouse receipt is cognizant of all that is done at the warehouse. If we can venture to offer a suggestion as to the individual defendants, it is not reasonable to suppose that they took these "security instruments" for their loans knowing or believing all those matters to be true which are charged in this bill.

(3) Subdivision *e* of section 67 is also subject to the four months limitation, and preserves the rights of *bona fide* incumbrancers.

Hence this provision affords no support to the present action.

What has been said, *supra*, applies equally to this section, and need not be repeated.

It may be added that this section contemplates only that the trustee may re-possess himself of the *res* itself. The words "or its value", employed in section 70*e*, do not appear in this section.

III.

Section 70e.

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, *unless* he was a *bona fide* holder for value prior the date of the adjudication. Such property may be recovered or its value collected, from whoever may have received it, EXCEPT *a bona fide holder for value.* For the purpose of *such* recovery [*i. e.* from one *not* "a *bona fide* holder for value "] any court of bankruptcy, and any state court which would have had jurisdiction, if bankruptcy had not intervened, shall have concurrent jurisdiction."

In his (4th) edition of Collier on Bankrupty, at page 250, Mr. Hotchkiss—referring to the amendments of February 5, 1903, consequent upon the construction given to the original act of 1898 in Bardes v. Hawarden, 178 U. S., 524—notices that "the Senate judiciary committee struck out the words, which in the Ray bill concluded section 23*b*, but failed to strike out the corresponding clause conferring jurisdiction which the latter bill had added to section 70*e*. *This at once raises a doubt whether any suit to recover property transferred more than four months before bankruptcy can be laid other than in the state court.*" (Collier on Bank'cy., 4th ed., 250.)

In a case involving a transaction taking place more than four months before adjudication, to set aside which the trustee proceeded in the U. S. District Court, under existing section 70*e* (quoted by the court) Judge E. B. ADAMS, D. J., examining the whole act, quoting section 23*b*, came to the conclusion that his court had no authority to take cognizance of the cause "without the consent of the proposed defendant", which had not been obtained; and, for lack of it, he dismissed the case "*for want of jurisdiction*".

Referring to 178 U. S. 524, he says:

"In the light of that opinion Congress amended section 23*b* by adding 'except suits for the recovery of property under section 60*b* and 67*e*'. By this section (23*b*) as amended, in my opinion, Congress intended to, and did, confer jurisdiction without the consent of the proposed defendant *in cases contemplated in the exception*, namely, those for the recovery of preferential payments provided for by section 60*b*, and to set aside fraudulent conveyances provided for by section 67*e*, provided the payments or the conveyances were made within four months prior to the filing of the petition for adjudication. *In all other cases*, I think, *the law was left as it was prior to the amendatory act*".

Gregory v. Atkinson, 127 Fed. R. 183.

No other reasonable purpose can be assigned for striking out the words 'and section 70*e*' from the bill, leaving sections 60*b* and 67*e* as the only exceptions to the requisite consent prescribed by section 23*b* as the general rule for suits by a trustee in a federal court of the parties' residence.

Construing sections 23*b* and 70*e* as giving absolute right to the courts of bankruptcy to entertain suits under sections 60*b* and 67*e*, and only a right conditional upon the proposed defendant's consent to take cognizance of other suits by the trustee, makes all these sections harmonious and the law consistent. No other construction does this.

It is horn-book learning "that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act." (2 Cranch 52.)

Mut. Ins. v. Champlin, 21 Fed. R. 85.

"It is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has

been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together." Peck v. Jenness, 7 How'd. 623.

That case arose under the bankruptcy act of 1841.

Though the views of an individual legislator cannot affect the construction of a statute, the general course of the debate, the report and action of committees, and especially of one branch of the legislature in amending the bill, are proper subjects of consideration.

Ches. & Pot. Co. v. Manning, 186 U. S. 245
citing *Blake v. Nat. Bks.* 23 Wall. 319;
Platt v. Un. Pac. 99 U. S. 64, and
Church v. U. S. 143 *Id.* 464.

One great obstacle to the continued existence of a bankrupt law has been jealousy of the federal courts, in some parts of the country. It was this feeling that led to the original section 23*b*; and it induced the striking out of 70*e* from the proposed amendment of that paragraph.

The matters covered by amended sections 60*b* and 67*e* relate to preferences and conveyances *intended* to defeat the object of the bankrupt act; and, therefore, preferably to be heard in the bankruptcy courts. Section 70*e* affects fraudulent conveyances, running back through the period of the state's statute of limitations, which are a fraud upon creditors, though made without reference to the bankrupt act. These long-past transactions it was considered by the Senate should be left to the state courts, unless the defendant was willing to submit them to the scrutiny of a federal tribunal —and the House acquiesced in this disposition of the matter.

IV.

Consent of the proposed defendant.

Assuming Judge E. B. ADAMS' construction to be correct, we will note that it is not the defendant's consent that is made a condition precedent to jurisdiction, but that of the person whom the trustee proposes to make a defendant.

A 'proposed' defendant is not one *in esse*, but one intended to be made such *in futuro*. The purpose to sue him in a bankruptcy court must be communicated, and assented to by him, *before* service of the summons; for that service makes him, *eo instanti*, a defendant, calling him into court to make *some* defence.

Unless obvious necessity compels, no statutory word should be rejected as insensible or superfluous; but should be taken according to its ordinary meaning. (16 Howd. 261.) This word 'proposed', inserted in the original, and retained in the amended, act cannot have been employed inadvertently. It would have been simpler to have omitted it, if the consent of one already sued had been intended; but such was not the intention. It was not designed that the dockets of the federal courts should be lumbered up with cases in regard to which it was problematical, at the time of their entry, whether jurisdiction could be retained. The intention was to transfer from the plaintiff to the defendant the election of the tribunal in which such litigation should be conducted. It limited the jurisdiction of federal courts to such persons, not otherwise amenable to it, as had consented thereto; Congress having power to impose any limitation seeming to it good.

If, then, this be a jurisdictional fact, it should be alleged in the complaint; and the present one contains no such allegation.

Of course, if a defendant goes on to litigate the merits, he estops himself from making the objection; no man can complain of a judgment, or proceeding, to which he has assented. Thompson v. Perkins, 57

Maine, 290. Exgr., a petitioner for the location of a way, cannot have the proceedings quashed as irregular. *Volenti non*, etc.

V.

Bona Fide Holder.

The trustee can avoid a fraudulent transfer which any creditor could, and recover the property, or its value from the transferree, "*unless he was a bona fide holder for value* prior to the date of the adjudication. Such property may be recovered, or its value collected, from whoever may have received it *except* a *bona fide* holder for value." (Sec. 70*e*.)

"For the purpose of *such* recovery," from one not holding *bona fide*—and for that purpose only—the courts of bankruptcy are given jurisdiction.

This paragraph *e* being intended to define a statutory jurisdiction, every element of this definition must be stated in a complaint asking a hearing in this court, including the bad faith of, or non-payment of value by, the defendant. Every holder in good faith, for value, is immune from attack by the trustee; hence, an averment that the defendant is *not* such holder is an averment vitally necessary to sustain jurisdiction against a demurrer. The trustee can drag into court no one against whom he is unwilling to make this charge.

The presumption against jurisdiction, in addition to the ordinary rules of pleading, require the trustee to make this charge, affirmative in fact, even if negative in form. (Potter's Dwarris, 119; 1 Kent, Com. 463.)

As Mr. Endlich says;—

"The effect of an exception which is part of the enacting clause, and is of general application is to restrict from application to the matters excepted the general language of the section or statute which, without the exception, would have included the same," adding in a note;—"It follows that in an action based

on the statute *the pleadings must negative an exception* contained in the enacting clause, as otherwise *it cannot be seen that the general language of the statute embraces the particular case.*" Endlich on Stats. Sec. 184, p. 253. He explains 'enacting clause' to mean the body of the statute. (15 Pet. *445.)

Wayman v. Southard, 10 Pet. *30.
Savings Bk. v. U. S. 19 Wall. 236.

It must be averred that a defendant is not within the exception of the statute. Whatever is necessary to give a right of action to the plaintiff must be averred.

Walker v. Johnson, 2 McLean, 92.

The following excerpt from Judge McLean's opinion shows the pertinency of his decision to the case at bar.

"The statute does not originate the cause of action; but it protects the defendant from an action unless he be *charged* with fraud, negligence or waste. Now, in this matter of defence to be set up by the defendant, or is it *inseparably connected with the plaintiff's case?* An executor or an administrator can only be made personally responsible by suggesting a devastavit: and this suggestion must always be made in the declaration. Now, in the present case, the defendant is not liable to be sued, unless fraud, negligence or waste be *charged.*"

Walker v. Johnson, 2 McL., 96, 97.
Clough v. Shepherd, 31 N. H., 494,

where that court say the principle, though more often declared in penal actions, is equally applicable to civil cases; citing Vavasour v. Ormod, 6 B. & C. 431 (debt upon a lease) and other authorities.

The Maine Court said: This is a suit in equity. In regard to such suits, the jurisdiction of this Court is limited and specific. Even in Courts of general equity jurisdiction, a bill in equity must state a cause within the appropriate jurisdiction as a Court of equity": and within such Court's limitations, of course, whatever they may be.

Chase v. Palmer, 23 Me. 345; Whitman, C. J.
Ex. p. Smith, 94 U. S., 455. Bigelow, 114.
7 How. 132, 159; 16 Wall. 29, 10 N. Y. 369.

Though, in many particulars, complainant's bill may be defective we do not refer to the omission of any statements except such as are essential to show jurisdiction in this Court.

Where jurisdiction depends upon diverse citizenship, the averments, though affirmative in form, are really only to negative the idea of a common citizenship. Conversely, it is the existence of bad faith that is to be proved by plaintiff. (21 Wall 359) although, in form, alleging the want of good faith. This allegation is as vital as that of citizenship where jurisdiction depends upon that fact.

We will cite authoritative definitions of '*bona fide*' to show that the general allegations of this bill do not charge a want of it, to supply the omission of a direct statement to that effect.

Bona fide. "Good faith. A creditor or purchaser in good faith is one who has loaned money or purchased property fairly, in the usual course of business, for an honest price, and without being cognizant of, or implicated in, any intent which the borrower or seller may have had to evade claims of his creditors, or defraud some person interested in the matter." (1 Abbott's Law Dict. 536.)

Quoted in Anderson's Law Dict. 446.

The burden of proving bad faith is on assailant of taker's title; hence, he must allege it. Hotchkiss v. Nat. Bks. 21 Wall. 359 and citations.

Under those provisions relating to preferences, or fraudulent conveyances, within four months, it has been said repeatedly that the transferree's "cause to believe" the bankrupt's purpose to be to evade the law must be alleged. This is equivalent to '*bona fide*' in section 70*e* except the proof would have to be more stringent under this latter section.

The bill nowhere charges that defendants were not holders for value. On the contrary, it declares the transaction which the trustee attacks, and the warehouse receipts issued under it, were for the purpose of borrowing large sums of money (Pars. 6 and 7); and its

paragraph 12 says these receipts were delivered "to secure certain loans."

Bad faith, or the absence of good faith, is nowhere charged. The statement that defendants took them "to *secure*" present loans certainly leads to the inference of good faith.

The adjectives or epithets used in the bill are not admitted by the demurrer; the court simply ignores them.

Fogg v. Blair, 139 U. S. 127;
Kent v. Lake, 144 *Id.* 91.

Disregarding them, it is shown that Dresser & Co. gave a lease to the Security Warehousing Co.; that a custodian of the goods was designated by this Company; and thereupon it issued these warehouse receipts, contemporaneously with the storage of the goods. Subsequent neglect or inattention on the part of the Warehousing Co., or its custodian, could not invalidate these instruments, taken in good faith and for value at their inception, or afterwards. Suppose the methods adopted were ultimately found to be injudicious and insufficient for protection of the goods; that does not make them void *ab initio*.

That the Warehousing Co. let Dresser & Co. have money on these receipts is evidence that, even if careless, it acted in good faith, and without knowledge that any removal of goods by Dresser & Co. was permitted by its custodian.

There is no claim that any other defendant had knowledge or notice of any one of the recited circumstances, even if they occurred as stated. Indeed, it is not alleged that the Security Warehousing Co. had any such knowledge or notice. There is only the general, insufficient, allegation that "the defendants knew or ought to have known" the matters mentioned—which has already been discussed. (*Ante*, p. 5.)

The Supreme Court, per FIELD, J., said;

"A suspicion that there is a defect in title in the holder or a knowledge of circumstances that might excite suspicion in the mind of a cautious person, or

even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, *which implies guilty knowledge* or wilful ignorance, and the burden of proof lies on the assailant of the title." Hotchkiss v. Nat. Bks. 21 Wall. 359.

Murray v. Lardner, 2 *Id.* 110.
Goodman v. Simonds, 20 How. 363.
Jacobs v. Morrison, 136 N. Y. 104, 105.

Warehouse receipts have been so generally issued and transferred in recent years that they have become entitled to the privileges of negotiable paper; but this is immaterial, as section 70*e* gives every honest transferee the same protection.

New York State law does the same; as will be seen by reference to the "Personal Property Act", which the complaint supposes to have avoided our liens.

"SECTION 29. This article does not affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appear that such purchaser or incumbrancer had *previous* notice of the fraudulent intent of his *immediate* vendor, or of the fraud rendering void the title of *such* vendor."

So no creditor in this state could have shown a cause of action without averring *mala fides* of this character.

VI.

Only bankrupt's transfers affected.

Inasmuch as section 70*e* is confined to setting aside transfers *by the bankrupt*, if these warehouse receipts were taken in good faith the recitals of what the receivers, or the Warehousing Co., or any defendant did after the goods had passed from the possession of Dresser & Co. are all immaterial to this case.

Bryan v. Bernheimer, 181 U. S. 194.

The demurrer should be sustained, and the bill dismissed.

SMITH & BARKER,
No. 56 Pine Street,
Attorneys for Security Warehousing Co.

EDWIN B. SMITH,
SAMUEL B. CLARK,
Of counsel.

Supreme Court of the United States.

No. 576.—October Term, 1904.

Edward B. Whitney, as Trustee in Bankruptcy of Daniel LeRoy Dresser and Charles E. Riess, as members of the firm of Dresser and Co., Appellants,
vs.
Charles H. Wenman, Stuyvesant Fish, George C. Boldt, et al.

Appeal from the District Court of the United States for the Southern District of New York.

[May 29, 1905.]

Edward B. Whitney, as trustee in bankruptcy of Daniel Leroy Dresser and Charles E. Riess, members of the firm of Dresser & Company, filed a bill in equity against Charles H. Wenman, Stuyvesant Fish and George C. Boldt, in the District Court of the United States for the Southern District of New York. Upon demurrer to the bill, the court dismissed the same for want of jurisdiction. The allegations of the bill set forth in substance: That on September 17, 1903, the complainant was duly appointed trustee in bankruptcy of Dresser and Riess, doing business as Dresser & Company, and that as such trustee he qualified on September 29, 1903. That during the time mentioned in the bill, and up to March 7, 1903, Dresser & Company were carrying on business as merchants in the city of New York. That the defendants, the Security Warehousing Company and the United States Mortgage and Trust Company, were corporations of the State of New York. That the defendant, Charles H. Wenman, acted as the agent and attorney in fact of the defendants Fish and Boldt. Prior to March 7, 1903, the bankrupts, partners as Dresser & Company, became insolvent, and on that day assigned all their property for the benefit of their creditors. On March 9, 1903, upon the petition of certain creditors, Robert C. Morris and Charles S. Mackenzie were appointed by the District Court for the Southern District of New York receivers in bankruptcy of Dresser & Company. That at least six months prior to March 7, 1903, the firm of Dresser & Company had been insolvent and unable to pay its debts, and was only able to continue in business by borrowing large sums of money, and in order not to injure the creditors it became necessary to pledge the goods, wares and merchandise in which the company was dealing, but to conceal said pledge from the unsecured creditors. That the goods dealt with by Dresser & Company consisted for the most part of Japanese silks imported for sale. For the purpose of pledging these goods with certain of the creditors, without the knowledge of the

other creditors, Dresser & Company entered into a plan or arrangement with the defendants, the Security Warehousing Company, to wit, a certain alleged lease of the store, display and sales rooms was made by Dresser & Company to the Security Warehousing Company at a nominal rental of one dollar a year, in order that thereafter the said warehousing company might claim that the goods and display and sales rooms belonged to it. That the goods in reality belonged to the firm of Dresser & Company, and there was no change of location or ownership of the said goods, but Dresser & Company remained in possession and control thereof and permitted the display of them in the same manner as that firm had done prior to the pretended storage. Dresser & Company exhibited the goods to their customers, sending portions to dyers and manipulators, and generally handled and used them as if they were their own, and free and clear from all claims and encumbrances. That the Security Warehousing Company exercised no supervision or control over the said goods, but merely employed, or pretended to employ, the confidential clerk and secretary of Daniel Leroy Dresser and Dresser & Company, as its alleged custodian, in whose charge it was claimed the goods had been placed at a salary of one dollar per month. She exercised no control or supervision over the goods, but during the period of her employment continued to act as the confidential secretary of the bankrupts. The Security Company also placed a few small tags on the shelves and bins in which the goods were stored and displayed for sale, upon which tags the name of the Security Company was printed, but the tags were not easily discovered, and in most instances were so placed as not to be readily seen and were not of such a character as to identify the goods.

The bill then avers the issue of certain warehouse receipts upon said goods, representing that they had been stored with the company at its warehouse at 15–17 Greene street, New York, which was, in fact, the store of Dresser & Company. Then follow allegations as to the delivery of the warehouse receipts, some to the United States Mortgage and Trust Company and some to the defendant Wenman for himself or defendants Fish and Boldt. And it is averred that the security instruments did not describe the goods in such a way as to make them capable of identification. That Daniel LeRoy Dresser was one of the incorporators of the Security Warehousing Company, and one of its directors and stockholders. That at the time of the delivery of the security instruments Charles S. Makenzie was general counsel of the Security Company, and was fully cognizant of the system of pretended storage before described, and was also personal counsel for Daniel LeRoy Dresser. That after the delivery of the warehouse instruments Dresser & Company continued to display and sell and dispose of the goods and manage the business in the same manner that they had been in the habit of doing prior to the said pretended storing, without objection from the Security Warehousing Company. Then follow allegations as to the knowl-

edge or opportunity for knowing on the part of the defendants of the situation above described. When the receivers Morris and Mackenzie went into possession of the stock of Dresser & Company on March 9, 1903, upwards of $150,000 worth of the goods was still in the possession and under control of Dresser & Company. After the receivers had taken possession of the store the Security Warehousing Company notified them that it claimed that the store display and sales rooms belonged to it under the alleged lease, and that the goods therein contained had been stored with Dresser & Company, and requested the delivery of all the goods to it. The receivers did not dispute this claim of the warehousing company, but complied with it. Neither the court or the unsecured creditors of Dresser & Company were advised of the facts concerning this claim or the character of the pretended storing upon which the issue of the so-called warehouse receipts was based. Then follow allegations as to the sale of the goods, and that the Security Warehousing Company claimed that certain of the goods supposed to have been stored with Dresser & Company and covered by the security instruments had been sold by Dresser & Company before March 7, 1903, amounted to the sum of $22,000. That said receivers collected upwards of $20,000 of accounts receivable of Dresser & Company, and paid the same over to the Security Warehousing Company. That these goods were sold and the accounts collected by the warehousing company before the appointment of complainant as trustee in bankruptcy of Dresser & Company. None of said goods or their proceeds have come into the hands of the trustee except the sum of $1,944.93, paid to the complainant by the Security Company. Then follow averments as to the payment of the proceeds of the goods sold and accounts collected to the other defendants and the holders of said warehouse receipts. It is averred that the books and records of the Security Warehousing Company are lost or destroyed. It is alleged that the attempt to create a lien upon the goods in the manner aforesaid was contrary to law and the statutes of the State of New York. That the silk goods had been sold at much less than their value. The prayer of the bill is that the security instruments be declared invalid, fraudulent and void, and that the complainant be decreed the owner of the goods and accounts, and that the defendants be required to account for the value of the same, and for general relief as the nature of the case may require.

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

This case is here upon the question of the jurisdiction of the District Court to entertain the action. The case in the court below was dismissed for want of jurisdiction, the demurrer having been sustained solely upon

the ground that the bankruptcy act of July 1, 1898, as amended by the act of February 5, 1903, gave the court no jurisdiction. We are not concerned with the merits of the controversy further than the allegations concerning the same are necessary to be considered in determining the question of the jurisdiction of the District Court as a court of bankruptcy to entertain this suit. It is sufficient to say that in our opinion the bill made a case which presented a controversy for judicial determination as to the right of the defendants to hold the lease and property under the alleged security of the warehouse receipts undertaken to be issued in the manner set forth in the petition. Whether it will turn out upon full hearing that the lease and securities are good, is not now to be determined. The bill makes allegations which raise a justiciable controversy as to the validity of the alleged lien in view of the lack of change of possession of the goods under the circumstances set forth. The question for this court now to determine is whether the bankruptcy court, on the allegations made and admitted as true by the demurrer, had jurisdiction to determine the controversy. It is positively alleged in the bill that the supervision and control of the goods continued in the firm of Dresser & Company, and that the alleged doings of the Security Warehousing Company and its agents were merely colorable and did not, in fact, change the control over the goods, nor give any notice of the alleged lease of the warehousing company, nor the lien of the instruments thereby secured. It is further positively averred that when the receivers were appointed upwards of $150,000 worth of goods belonging to the firm were in the possession and under the control of the bankrupts, and after the receivers had taken possession of the store the goods were delivered up to the warehousing company without any order or attempt to procure the sanction of the court to such surrender of the property. Under these circumstances had the bankruptcy court jurisdiction to determine the rights of parties claiming interests in the property?

Section 2 of the bankrupt act of 1898, among other things, confers jurisdiction upon the District Courts of the United States, as courts of bankruptcy, (3) to "appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;" (7) to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

This section, in connection with section 23, was before this court for construction in the case of *Bardes* v. *Hawarden Bank*, (178 U. S. 524,) in which case it was held that section 23*b* of the act as it then stood prevented the

courts of the United States from entertaining jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of the bankruptcy proceedings, without the consent of the defendants. In that case it was held that the power conferred in subdivision 7 of section 2, above quoted, was limited by the direct provisions of section 23 as to the jurisdiction of suits brought by trustees, the effect of which section was to compel the trustee to resort to the State courts to set aside conveyances of the character named where an alleged fraudulent transfer had been made by the bankrupt before the beginning of the proceedings, unless jurisdiction in the District Court was by consent. This case, *Bardes* v. *Bank*, did not determine the right of the District Court to entertain jurisdiction of a proceeding having in view the adjudication of rights in or liens upon property which came into the possession of the bankruptcy court as that of the bankrupt; the right to proceed concerning which would seem to be broadly conferred in the section of the bankruptcy act above quoted. At the same term at which the Bardes case was decided, this court determined the case of *White* v. *Schloerb*, (178 U. S. 542.) In that case it was held that, after an adjudication in bankruptcy, an action in replevin could not be brought in the State court to recover property in the possession of and held by the bankrupt at the time of the adjudication, and in the hands of the referee in bankruptcy when the action was begun, and that the District Court of the United States, sitting in bankruptcy, had jurisdiction by summary process to compel the return of the property seized. In the case of *Bryan* v. *Bernheimer*, (181 U. S. 188,) it appeared that the bankrupt had made a general assigment for the benefit of his creditors nine days before the filing of his petition in bankruptcy, and the assignee sold the property after the bankruptcy proceedings had been begun, after the adjudication in bankruptcy, but before the appointment of a trustee. Upon petition of creditors the District Court ordered that the marshal take possession, and the purchaser appear within ten days and propound his claim to the property, or, failing so to do, be declared to have no right in it. The purchaser appeared and set up that he bought the property in good faith from the assignee, and prayed the process of the court that the creditors might be remitted to their claim against the assignee for the price, or the same be ordered to be paid into court by the assignee and paid over to the purchaser who was willing to rescind the purchase upon receiving his money. It was held that the purchaser had no title to the bankrupt's estate, and that the equities between him and the creditors should be determined by the District Court, bringing in the assignee if necessary. In that case Mr. Justice Gray, who also delivered the opinion in the Bardes case, said:

"The bankrupt act of 1898, section 2, invests the courts of bankruptcy with such jurisdiction, at law and in equity, as to enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms to make adjudications of bankruptcy and, among other things, (3) appoint receivers or the marshals upon the application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controverstes in relation thereto, except as herein otherwise provided. The exception refers to the provision of section 23, by virtue of which, as adjudged at the last term of this court, the District Court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bankruptcy. (*Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Mitchell* v. *McClure*, 178 U. S. 539; *Hicks* v. *Knost*, 178 U. S. 541.)"

This case (*Bryan* v. *Bernheimer*) would seem to limit the effect of the decision in the Bardes case to suits against third persons on account of transfers made before the bankruptcy, and to recognize the right of the bankruptcy court to adjudicate upon rights in property in the possession of the court belonging to the bankrupt. In the case of *Mueller* v. *Nugent*, (184 U. S. 1,) this court recognized the power of the bankruptcy court to compel the surrender of money or other assets of the bankrupt in his possession or that of some one for him. In that case the decisions in *Bardes* v. *Hawarden Bank*, *White* v. *Schloerb* and *Bryan* v. *Bernheimer* were reviewed by the Chief Justice, who delivered the opinion of the court, and it was held that the filing of a petition in bankruptcy is a *caveat* to all the world, and in effect an attachment and injunction, and that on adjudication title to the bankrupt's estate became vested in the trustee with actual or constructive possession, and placed in the custody of the bankruptcy court.

We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in the Federal courts. (*In*

re Whittener, 105 Fed. Rep. 180; *In re Antiago Screen & Door Co.*, 123 Fed. Rep. 249; *In re Kellogg*, 121 Fed. Rep. 333.) In the case of *First National Bank of Chicago* v. *The Chicago Title & Trust Company*, decided on May 8 of this term, in holding that the jurisdiction of the District Court did not obtain it was pointed out that the court had found that it was not in possession of the property. Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure.

It is insisted that in the present case the property was voluntarily turned over by the receiver, and thereby the jurisdiction of the District Court, upon the ground herein stated, is defeated, as the property is no longer in the possession or subject to the control of the court. But the receiver had no power or authority under the allegations of this bill to turn over the property. He was appointed a temporary custodian, and it was his duty to hold possession of the property until the termination of the proceedings or the appointment of a trustee for the bankrupt. The circumstances alleged in this bill tend to show that the transfer of the property was collusive, and certainly if the allegations be true, it was made without authority of the court. The court had possession of the property and jurisdiction to hear and determine the interests of those claiming a lien therein or ownership thereof. We do not think this jurisdiction can be ousted by a surrender of the property by the receiver, without authority of the court. Whether the rights of the claimants to the property could be litigated by summary proceedings, we need not determine. What we hold is that under the allegations of this bill the District Court had the right in a proceeding in the nature of a plenary action, in which the parties were duly served and brought into court, to determine their rights, and to grant full relief in the premises if the allegations of the bill shall be sustained. This view renders it unnecessary to consider the effect of the amendments of the bankruptcy act, passed February 5, 1903, broadening the power of the bankruptcy courts to entertain suits by trustees to set aside certain conveyances made by the bankrupt.

Decree reversed.

True copy.

Test:

Clerk Supreme Court, U. S.